United States of America

Nuclear Regulatory Commission

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| In the Matter of<br>BOSTON EDISON COMPANY<br>(Pilgrim Nuclear Generating<br>Station Unit #1) | E.A. #81-63<br>(Docket No. 50-293)<br>(License No. DPR-35) |

Supplement to March 18, 1982 Submission of
Massachusetts Executive Office of Energy Resources,
Requesting that Civil Penalties Be Compromised, Mitigated, or Remitted

The Massachusetts Executive Office of Energy Resources ("EOER"), submits this supplement to its original petition dated March 18, 1982 in the above-referenced matter. EOER has been notified by Mr. Richard C. DeYoung, Director, Office of Inspection and Enforcement, NRC, by letter dated March 31, 1982, that EOER's request is being treated as a request for action under 10 CFR 2-206.

EOER reiterates its March 18, 1982 request that NRC require Boston Edison Company to finance a home weatherization/conservation program in an amount equal to the civil penalty imposed by NRC in connection with operation of the company's Pilgrim I nuclear generating unit. Such expenditures would be in lieu of final imposition of the proposed penalty or in fulfillment of the penalty obligation in lieu of final acceptance of payment of the penalty. Customers within the service area of Boston Edison Company and other utilities which receive power directly from the Pilgrim I unit under long term contract would be eligible for the benefits of the program. NRC is requested to order a reduction, remission or mitigation of the penalty, in connection with an order to Edison to make payment for the public service program as proposed by EOER of an amount equivalent to the portion of the penalty as remitted, mitigated or reduced or to adopt such other procedures as may effectuate the same purpose.

This supplement provides additional information concerning the discretion of NRC to compromise, remit or mitigate penalties by providing for alternative actions of the licensee to be penalized in answer to the questions as to (1) what discretion a Federal agency has to dispense monies it collects in civil penalty cases and (2) what discretion a Federal agency has to enter into settlement agreements with parties against which it is considering imposing a civil penalty.

Summary. Section 234 of the Atomic Energy Act gives the Nuclear Regulatory Commission discretion and complete flexibility to compromise, remit, or mitigate civil penalties on whatever terms and conditions it sees fit. Nothing in the law, or in the judicial interpretations of that section, limits the NRC in fashioning a settlement of a penalty action which meets its enforcement goals. In fact, the relevant government-wide policy, promulgated by the U.S. Dept. of Justice and General Accounting Office, specifically confirms the agency's discretion to compromise where the agency's enforcement policy will be adequately served.

Moreover, the NRC authority to compromise, remit, or mitigate civil penalties, which traces its ancestry back to similar enactments in the earliest days of the nation, and to England as well, carries with it an ample historical tradition for the relief sought. Explicit precedents exist for conditioning the offer of compromise remission or mitigation upon acts or payments by the violator, acting at the request of and for the benefit of third parties, and requiring actions in the Public interest in lieu of a penalty.

Precedents from other federal agencies, even where technically distinguishable from the NRC's authority in procedure or type of authority, demonstrate clearly that remedial alternatives to civil penalties are in fact frequently utilized in lieu of and in preference to civil penalties. Such alternative relief provides a more flexible and effective avenue for serving enforcement goals and the public interest than the simple levy and collection of a civil penalty.

NRC, GAO, and Congress have recognized that the prior NRC practice of levying and accepting civil penalties, was not adequate. While higher civil penalties may help, they are still in NRC's words "negligible for the larger licensees". Discretionary options such as the one suggested here may not only encourage licensees to respond more effectively in NRC's enforcement efforts, but may also provide a positive avenue for NRC to build bridges of communication and understanding with local communities, and to develop an active public constituency for its enforcement programs.

I. Section 234 of the Atomic Energy Act provides clear and broad discretion to NRC in the exercise of its power to compromise, remit, or mitigate civil penalties.

The language of Section 234 of the Atomic Energy Act (42 U.S.C. 2282 (a)) could not be clearer: "The Commission shall have the power to compromise, mitigate, or remit such penalties." There are no stated limits or conditions on that power, such as are

frequently found in other similar statutes. See in contrast 19 U.S.C. & 1618:" if he finds...without willful negligence or without any intention...to defraud..." (Secretary of the Treasury, customs violations). Rather, implicit in the streamlined language of s.234 of the Atomic Energy Act is the explicit and, as will be shown below, somewhat superfluous wording of some older statutes such as 46 U.S.C. s.7("The Commandant[of the Coast Guard or the Commissioner of Customs]..may...remit or mitigate any fine, penalty, or forfeiture...upon such terms as he, in his discretion, shall think proper..."). See also, 15 U.S.C. & 1825 (b)(4) ("The Secretary [of Agriculture] may, in his discretion, compromise, modify, or remit, with or without conditions, any civil penalty..."). See also 15 U.S.C. & 2008 (b)(3) where similar powers are granted to the Secretary of Transportation concerning civil penalties for fuel efficiency standards violations, but with stated limits on discretion.

The courts have been uniformly unwilling to interfere with agency powers to remit and mitigate. In the first place, these powers are a part of the general agency task of designing enforcement and remedial policies to pursue Congressional goals. Of course, "the breath of agency discretion is, if anything, at zenith when the action...relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of Congressional objectives." Niagara Mohawk Power Corp. v. FPC, 379 F. 2d. 153, 159 (1967). In this context "The principles of equity are not to be isolated

as a special province of the Courts. They are rather to be welcomed as reflecting fundamental principles of justice that properly enlighten administrative agencies under law." Id. at 160.

In fact, even where other features of s.234 have been deemed reviewable in court, it has been ruled that "the imposition of monetary penalties and the severity of sanction involves the exercise of the agency's discretionary power." NRC v. Radiation Technology, Inc, CCH Nuclear Regulation Reports s.20,211, F. Supp. (D.N.J. 1981). The s.234 power to compromise, mitigate or remit is not even subject to the implicit limits of the initial computation of a penalty. House Conference Report No. 96-1070 to Accompany S.562, at 34, reprinted in (1980) U.S. Code Cong. & Ad. News 2277, sets forth the traditional "relevant factors" of "the gravity of the violation, the financial impact on the licensee, good faith, and the history of previous violations" in setting the amount of any penalty, but provides no guidance in subsequent compromise, mitigation, or remission of such penalties once set. Thus the discretion of NRC is broad here.

Indeed, the only instance of a judicial suggestion of intervention in a mitigation context is when adminstrative officials refuse to entertain a mitigation claim on the erroneous belief that they have no statutory authority to do so. See, U.S. v. One 1970 Buick, 463 F. 2d. 1168 (5th Cir. 1972), cert. denied, 409 U.S. 980. See also, Cotonificio Bustese v. Morganthau, 121 F. 2d. 884 (D.C. Cir. 1941) ("relief in the nature of mandamus may be given when an administrator decides erroneously a question which is jurisdictional and the effect is to prevent him from considering the merits or exercising his discretion. p. 886,887.").

That the NRC should not feel constrained in its flexibility to compromise civil penalty claims is confirmed by the joint guidance to federal agencies promulgated by Justice and GAO pursuant to the Federal Claims Collection Act of 1966, 31 U.S.C. §952. In a provision entitled "Enforcement Policy," 4 C.F.R. §103.5, the two agencies state that "[p]enalties established as an aid to enforcement to compel compliance may be compromised ... if the agency's enforcement policy in terms of deterrence and securing compliance, both present and future, will be adequately served by acceptance of the sum to be agreed upon." While this guidance cannot operate to restrict NRC's discretion to settle or compromise (see 31 U.S.C. 953), and its direct applicability to this case would depend on the precise amount attributable to particular claims, (see 31 U.S.C. s. 952 (b); 4 C.F.R. 101.6) it does provide affirmative encouragement to NRC to avail itself of its discretionary compromise powers to enhance its enforcement policy. See, 4 C.F.R. § 104.4. Justice's own internal guidelines go even further in subordinating other considerations to the client agency's own enforcement priorities: "[c]ivil penalties are assessed to vindicate agency enforcement policy, or to compel compliance with agency orders, etc.... Thus, the views of the client agency should always be sought before considering the compromise or closing of such cases...." U.S. Attorneys Manual §§ 4-6.500 (Jan. 3, 1977) (Emphasis in original ). Also, as discussed in the original submission and below, Justice has routinely endorsed compromises where remedial actions by the violator are accepted in lieu of civil penalties.

II. The long history of the power to remit or mitigate demonstrates that it can and should be used in the manner proposed by EOER.

The provisions of §234 and its immediate predecessors trace back to the Act of Congress of March 3, 1797, 1 Stat. 506, the ancestor of 19 U.S.C. §1618, supra, which vested the Secretary of the Treasury with authority to mitigate or remit any fine, penalty, forfeiture or disability arising from certain duty and tax laws. See, The Laura, 114 U.S. 411, 414 (1885). Actually that law traced back to a 1790 enactment (2 L.U.S. 103), which in turn was traceable to various English statutes under George III which empowered his officers "to restore, remit, or mitigate any forfeiture or penalty .." upon such terms and conditions as to costs, or otherwise, as under the circumstances of the case shall appear reasonable. 27 Geo III, c 32, s 15; 54 Geo III, c 171, and 51 Geo III, c 96 as cited in U.S. v Morris, 10 Wheat, 246, 293-4, 6 L.Ed. 314, 325 (1825).

Indeed, in U.S. v. Morris, supra, the Supreme Court makes clear that almost all of the features of the remission and mitigation power sought to be invoked here were always an integral part of the power. Speaking for the Court, Justice Thompson confirmed that the federal official's mitigation and remission power is unreviewable and "submitted to his sound discretion," 10 Wheat. at 285, 6 L.Ed. at 323. He states that the power is designed "to provide equitable relief.... It presupposes that the offense has been committed, and the forfeiture attached according to the letter of the law,...." (10 Wheat. 291, 6 L.Ed. 324-5) subject to any explicit limits of the particular statute.

Justice Thompson goes on to point out that, although the third party claimants to a share of the forfeiture in that case

had no fixed claim, nevertheless the fact that the Secretary could discontinue the forfeiture action upon such terms or conditions as he may deem reasonable and just enables him to do ample justice to the interested third parties in the case, the custom-house officers, "not only by reimbursing all costs and expenses incurred, but rewarding them for their vigilance, and encouraging them in the active and diligent discharge of their duty in the execution of the revenue laws." 10 Wheat. at 292, 6 L.Ed. at 325. In other words, this case stands strongly fo. the propostions that the remit or mitigate power gives an official the discretion to apply principles of equity to do justice, and may be used to elicit benefits for third parties, especially where that would enhance the enforcement functions, by conditoning the remission on payments to such third parties.

An 1885 Supreme Court case, The Laura, supra, interpreting a regulatory scheme involving penalties for overloading steamships (Rev. Stat. §5294: "may ... remit or mitigate any fine or penalty ... upon such terms as he, in his discretion, shall think proper ..."), provides another source of guidance in the analysis of the power to remit or mitigate by analogy to the application of the President's Constitutional power to pardon or reprieve offenses against the Unidted States. In that case, an officer's power to remit penalties was seen as a legislatively authorized co-equal exercise of a lesser included portion of the President's clemency power. See 114 U.S. at 413-414. Other legal analysts of that century concluded that "[p]ardon and remission are synonymous terms, and their legal effect upon the rights of parties must be the same." Wheaton, for the appellants, in U.S. v Morris, supra,

10 Wheat. 246, 255, 6 L.Ed. 314, 316 (1825). The text of a typical Presidential pardon combined both terms:" I ... do hereby pardon ... for the crime for which he has been sentenced, remitting the penalty aforesaid." Pardon by Andrew Jackson of June 14, 1830, quoted in, U.S. v. Wilson, 7 Peters 150, 153, 8 L. Ed. 640, 641 (1833). See also, 28 C.F.R. §0.171(d) ("When ever the President remits .. a fine"). Thus it is logical that lawyers and judges (see Wheaton, in U.S. v Morris, supra; Justice Harlan in The Laura, supra, 114 U.S. at 416-17 29 L.Ed. at 149; cf. U.S. v Lancaster, 26 Fed. Reg. 859 (Cir. Ct. E.D. Pa. 1821)) looked, and should look, to the scope and terms of the exercise of the clemency power for appropriate precedents in the exercise of the power to remit or mitigate.

Again, certain relevant features of the clemency power were clear from the earliest cases. Chief Justice Marshall called a pardon "an act of grace ... which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed.... A pardon may be conditioned, and the condition may be more objectionable than the punishment inflicted by the judgement." U.S. v Wilson, supra, 7 Peters at 160-61, 8 L.Ed. at 160.

The clemency power has been seen as including the power to condition its exercise on any terms which do not otherwise offend the constitution, including those which are not specifically provided for in any statute. Schick v. Reed, 419 U.S. 256, 266-267, 42 L. Ed. 2d 430, 434-437. Recent Presidents have attached such conditions to their acts of clemency with a wide range of public interest justifications. See, e.g. Hoffa v. Saxbe, 378 F. Supp. 1221 (D.D.C. 1974) (" ... upon the condition that ... Hoffa not engage in direct or indirect management of

any labor organization," id. at 1224);

Apparently an "offer" of clemency can be unsolicited, see Federalist No. 74, quoted in Murphy v. Ford, 390 F. Supp. 1372, 1373 (W.D. Mich. 1975), where a "prudent public policy judgment" suggests such an offer. Id. at 1374.

There are, of course, related instances, especially at the state level, of third parties seeking executive clemency for those who decline to do so, but more directly relevant are the case and statutory precedents for remission and mitigation petitions to be filed by interested third parties. See, e.g., U.S. v. One Cadillac (GMAC), 337 F.2d 730 (6th Cir. 1964), applying 19 U.S.C. §1618, providing that third parties with an interest in forfited assets may seek remission. Thus such third party relief does not violate the purposes of the clemency or mitigation power. NRC's rules at 10CFR 2.206 allow proceedings to be initiated by "any person." EOER's request has been construed as a 10CFR 2.206 petition Thus there should be no procedural difficulty in NRC consideration of EOER's third party relief.

In short, apart from the fact that the plain language of § 234 gives NRC the maximum possible range and flexibility to compromise, remit, or mitigate, without any limitations, the history of practice under predecessor and analogous powers provides clear precedents for the action requested here by EOER.

The Energy Reorganization Act of 1974, P.L. 93-438 divided the functions of the old atomic Energy Commission between the NRC and ERDA. (Certain ERDA functions were subsequently reassigned to the U.S. Dept. of Energy by the Department of Energy Organization Act, P.L. 95-91). Section 104 (c) of the Energy Reorganization Act of 1974 stated "there are hereby transfered to and vested in the [ERDA] Administrator all functions of the Atomic Energy Commission...except as otherwise provided in this Act."

The above quoted language should not be construed to deny to the NRC the power to grant EOER's requested relief in these proceedings. EOER is not requesting that NRC conduct research and development work in connection with the promotion or development of nuclear power. Rather, EOER is requesting NRC to provide relief under its power to license nuclear power plants, including its civil penalty powers over the licensees of such plants. Section 201(f) of the Energy Reorganization Act of 1974 specifically states "there are hereby transferred to the [Nuclear Regulatory] Commission all licensing and related regulatory functions of the Atomic Energy Commission...". Sec. 205 of the Energy Reorganization Act of 1974 established an Office of Nuclear Regulatory Research at the NRC, thus evidencing the intent of Congress that NRC should pursue innovative and creative regulatory techniques. Also, Sec. 2 of the Energy Reorganization Act of 1974, declared a purpose that "Congress

hereby declares that the general welfare and common defense and security require effective action to develop, and increase the efficiency and reliability of use of all energy sources..." NRC as an agency created under that Act should have no difficulty in construing its licensing regulatory powers to further the energy conservation goals of the Act.

III. The precedents in other agencies which have, from whatever source, the option of eliciting or accepting remedial actions in lieu of civil penalties, demonstrate clearly that use of this option meets enforcement goals.

The question has been posed whether the precedents from other agencies cited in EOER's original submission may be inappropriate because in one case (FTC) the settlements must receive judicial approval, and in the other (DOE) the restitu-

tionary option is specifically offered by statute.

In fact these distinctions are without a difference. Although FTC settlements must be submitted to a court, as a practical matter the settlement is often negotiated before filing of the complaint, so that the court is presented with the complaint and proposed settlement simultaneously. The discretion being exercised is essentially that of the agency with the court acting merely as a check on any abuse. In the case of DOE, the statute merely provides a variety of sanctions available against regulatory violators. The selection among the sanctions to be pursued is made by the agency itself.

If anything, the distinctions operate in the other direction. That is, a court enforcing the Atomic Energy Act would not have the power to compromise, remit, or mitigate a civil penalty under s.234, with or without conditions. That power is reserved to NRC itself, or Justice once a case has been referred. Nor, as we have seen, could a court second-guess NRC's exercise of the remission/mitigation power. The fact that court-reviewed FTC settlements include acceptance of remedial actions in lieu of civil penalties should encourage NRC to solicit similar settlements in the exercise of its own essentially unreviewable powers.

Similarly the fact that Congress was moved to insert an explicit restitutionary option in s.209 of the Economic Stabilization Act, 12 U.S.C. s.1904 note (1970), could be seen as necessary in part because the associated civil penalty statute, s.208 (b), enacted at the same time, did not give DOE the discretionary "remit or mitigate" power, which implicitly would have allowed it to condition remission or

mitigation on restitution, and in part because Congress wanted to provide for mandatory restitution, not just restitution as part of a settlement.

Actually, these questions are beside the point. The real message of these federal agency precedents is that, regardless of the source of their authority, these active and experienced enforcement agencies, given the option of selecting remedial sanctions or civil penalty sanctions, have overwhelmingly chosen remedial type sanctions, sometimes specifically in lieu of civil penalties, to carry out their enforcement responsibilities. Once NRC agrees that its broad power to compromise, remit or mitigate gives it the option of offering remedial alternative to civil penalties, then its exercise of discretion to do so, in the interests of its enforcement goals, should be based largely on the successful experience of such other agencies. The citations in the original submission provide ample evidence of this experience.

IV. This case should be seen as one where a penalty payment has been proffered to or deposited with the agency subject to return, not as a disbursement of monies collected

EOER understands that the NRC staff received a check for $550,000 from Boston Edison Company on March 19, 1982, and deposited it in a special account at the U.S. Treasury over which the NRC retained control.

EOER proposes that NRC offer to compromise, remit, or mitigate the penalty (i.e., return the check or the proceeds of the check) on the condition that Boston Edison Company make payment to the Commonwealth of Massachusetts as requested in EOER's March 18, 1982 submission or that NRC order such payment by Boston Edison Company in discharge of its obligation to pay the penalty.

NRC could also technically hold the funds deposited with it for later disposal in accordance with a settlement. See Citronelle-Mobile Gathering v. Edwards, U.S. Temporary Emergency Court of Appeals, Jan. 21, 1982, slip op. at p. 12.

V. The relief suggested by EOER would enhance the deterrent and remedial effect of the civil penalty sanction.

NRC itself, supported by GAO and the Congress, recently recognized that the civil penalty scheme had not been effective in dealing with those major NRC licensees who have been unresponsive to NRC's enforcement actions. According to NRC, the financial effects of NRC's penalties were neglible for the larger licensees, such as utilities. See Senate Report 96-176 To Accompany S. 562, May 15, 1979, p. 23, reprinted in (1980) U.S. Code & Ad. News at 2238.

"NRC believes that these licensees might have responded more effecively to higher penalties which would provide NRC with escalated enforcement sanctions short of license suspensions...NRC believes that the present limits on civil penalties define too narrow a spectrum to accomodate a scale of penalties commensurate with the many types of licensees and the varying degrees (of) seriousness in violations." Ibid. EOER submits that even half a million dollars will have an uncertain lasting impact unless put to a creative use with a lingering impact on the area served by the power plant where the alleged violation occured.

On the positive side, as the 1980 Conference Report points out, based on NRC's presentation, there is a direct link between compliance performance and costs to the licensee's customers for "the high cost of replacement power when a reactor is shut down for repairs or other corrective action "; House Conference Report to accompany. S.562, Report No. 96-1070 (June 4, 1980), p. 34, (1980) U.S. Code and Administrative News at 2277. Unless the relevant utility rate regulatory agency intervenes. (See Consolidated Edison v. N.Y.Public Service Commission, 1981, CCH Nuclear Regulation Reports sec. 20,212), the community is the loser either way, with higher costs if repairs or corrective action are undertaken, and higher risks if they are not. Thus, the logic of some, even minimum, recycling to the local community of the violator's costs of non-compliance is clear. This should

be viewed as an opportunity for the NRC to become a positive regulator not only a penalty enforcement agency.

In significant part because of its remedial functions, DOE's enforcement office has found itself with an active and vocal constituency in the states, on Capitol Hill, among public interest groups, and in the general public. Whether NRC's civil penalty potential is large enough to stimulate that level of support for its activities, remains to be seen, but it cannot hurt the agency that others at the grass-roots share an interest in the success of its enforcement efforts. Also the EOER weatherization proposal, once initially funded, will be self perpetuating through recycling of loan repayments. Thus the program will continue to be a deterrant to future violations.

NRC's civil penalty power under s. 234 of the Atomic Energy Act and 10 CFR 2.205 should not be analyzed in a vacuum. The civil penalty power and procedures for remittance, mitigation, and compromise of proposed penalties can be used to enhance the remedial effect of NRC's broader powers to amend licenses and issue other remedial orders. An example of such an enforcement technique used by another Federal agency can be found in Air New England Inc., Civil Aeronautics Board Order 79-10-52 (1979). In that case an airline was accused of excessive "bumping" practices (i.e. refusing to board confirmed passengers on over-booked flights). The airline agreed to a settlement with the CAB whereby the airline would be required to pay a $34,000 civil penalty in installments, with payment of various installments forgiven if the airline met certain goals as to reduction of "bumping". The carrot of reducing a civil penalty payment amount already agreed to by the alleged violator

in return for more effective remedial action is directly relevant here.

We continue to urge NRC to grant the relief requested by EOER in EOER's original March 18, 1982 submission.

For the Massachusetts
Executive Office of
Energy Resources

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