



CHAIRMAN

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

FDR

July 21, 1982

DESIGNATED ORIGINAL

Certified By *NB*

The Honorable Joseph E. Brennan
Governor of Maine
Augusta, Maine 04383

Dear Governor Brennan:

This is to acknowledge receipt of your letter of June 29, 1982 expressing your support for the petition of the Massachusetts Executive Office of Energy Resources (EOER) requesting the use of the \$550,000 civil penalty imposed on the Boston Edison Company in a home weatherization and conservation program. The Director of the Nuclear Regulatory Commission's Office of Inspection and Enforcement denied the EOER petition in a decision dated May 28, 1982 on the grounds that NRC lacks the requisite legal authority to take such action (copy enclosed). The Commission is now considering whether to review the Director's decision pursuant to 10 CFR 2.206(c).

Thank you for your interest in this matter. We will keep you informed of any further developments.

Sincerely,

Nunzio J. Palladino
Nunzio J. Palladino

Enclosure:
As stated

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UNITED STATES OF AMERICA
 NUCLEAR REGULATORY COMMISSION
 OFFICE OF INSPECTION AND ENFORCEMENT
 Richard C. DeYoung, Director

In the Matter of

BOSTON EDISON COMPANY
 (Pilgrim Nuclear Station)

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)
)

Docket Nos. 50-293
 (10 C.F.R. 2.206)

DIRECTOR'S DECISION UNDER 10 C.F.R. 2.206

On January 18, 1982 the Director, I&E proposed to impose a civil penalty of \$550,000 on the Boston Edison Company for several violations of NRC requirements associated with the operation of the company's Pilgrim nuclear power facility. Without waiting for a formal order imposing the penalty, ^{1/} the company paid the penalty in full on March 19, 1982.

By letter dated March 18, 1982, as supplemented by a letter dated April 22, 1982, the Commonwealth of Massachusetts (through the General Counsel of its Executive Office of Energy Resources, Patrick J. Kenny, Esq., hereinafter "petitioner") has requested that instead of NRC

1/ See 10 C.F.R. 2.205(b).

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collecting the \$550,000, the money be turned over to petitioner "to finance a home weatherization/conservation program". ^{2/} The petitioner has in mind that "[c]ustomers within the service area of Boston Edison Company and other utilities which receive power directly from the Pilgrim I unit under long term contracts would be eligible for the benefits of the program." ^{3/}

I have decided to treat the petition as a request for action under 10 C.F.R. 2.206. ^{4/} For the reasons which follow the NRC lacks the requisite legal authority to take the action requested and the petition must be denied.

^{2/} Enclosure to letter of March 18, 1982, p.2.

^{3/} Ibid.

^{4/} The petition is not one which requests the institution of a proceeding for an enforcement action or for an investigation or for some other type of action normally embraced by 10 C.F.R. 2.206. Nonetheless, it is closely related to an enforcement action and prior to its formal filing the petitioner had been informally advised by NRC that it could achieve a definitive resolution at its request by invoking the 2.206 process. It should be noted that petitioner's request is alternatively styled a "Petition to Intervene in Civil Penalty Proceeding". Apart from the fact that the petition fails to demonstrate any adverse effect upon petitioner from the NRC's civil penalty action, no "proceeding" exists into which intervention might be considered as the penalty has already been paid.

The Nuclear Regulatory Commission's authority to regulate nuclear activities while quite broad, 5/ is neither limitless nor unchanneled. 6/ Rather, the regulatory actions of this agency must be grounded in considerations of radiological health and safety and the common defense and security. 7/ The Commission is, thus, without authority to exercise regulatory powers for a purpose not fairly encompassed by its regulatory purposes. 8/

5/ See, e.g., *Siegel v. Atomic Energy Commission*, 400 F.2d 778 (D.C. Cir. 1968) and *Public Service Co. of New Hampshire v. NRC*, 582 F.2d 77 (1st Cir. 1978).

6/ *New Hampshire v. AEC*, 406 F.2d 170, 175 (1st Cir.), cert. denied, 395 U.S. 911 (1969).

7/ Section 2.e. of the Atomic Energy Act of 1954. The NRC also has limited authority to regulate in promotion of national antitrust policies (section 105 of the AEA) and, under the National Environmental Policy Act of 1969, is required to formally consider environmental matters in the course of reaching its major licensing decisions. It should be noted in this connection that the regulations of the Council on Environmental Quality specifically exclude enforcement actions such as that here involved from the definition of "Major Federal action". 40 C.F.R. 1508.18(a) provides, in part, that:

"Actions do not include bringing judicial or administrative civil or criminal enforcement actions."

See also 10 C.F.R. 51.5(d)(1) of the NRC's regulations.

8/ *New Hampshire v. AEC* supra note 6. See also the Senate Report which accompanied the bill which became the Energy Reorganization Act. It is there stated that NRC was given "solely regulatory responsibilities, in keeping with a basic purpose of this Act [the ERA] to separate the regulatory functions of the Atomic Energy Commission from its development and promotional functions, which are transferred to the ERDA." S. Rep. No. 980, 93rd Cong., 2nd Sess., reprinted in [1974] U.S. Code Cong. & Ad. News 5483.

The petition here does not suggest that the action it wants the NRC to take is in any way related to radiological health and safety purpose of the civil penalty action taken here. There is in fact no rational connection between the fundamental regulatory purposes of the action taken against the Boston Edison Company and the petitioner's proposed program.

The petitioner seeks to avoid the effect of this legal impediment to its plan by asserting, without elaboration, that its plan "would enhance the deterrent and remedial effect of the civil penalty sanction." ^{9/} Contrary to this assertion, however, there is no basis for supposing that the "deterrent and remedial effect" could be in any way "enhance[d]" by the use made of the money collected. The impact on the company and those similarly situated licensees is created by having to pay the money. Indeed, it could perhaps better be argued that this impact would actually be lessened if the company could bask in a public perception that it was contributing money for the benefit of the surrounding community (for whatever reason). In all events, the legal bar remains. No rational connection exists between the advancement

^{9/} Enclosure to April 22, 1982 letter, p. 15.

of the basic regulatory purpose of the enforcement action against Boston Edison and the petitioner's plan. 10/

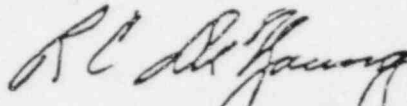
There is another, separate legal bar to the NRC's participation in petitioner's plan. NRC lacks the legal authority to do anything other than transfer to the U.S. Treasury monies collected as civil penalties. 11/ NRC could not legally evade this requirement through a scheme whereby penalties already paid to NRC would be remitted upon condition that they are paid to a person or entity other than the U.S. Treasury. This would be doing indirectly that which would be contrary to law if done directly, and as such, contrary to law also.

For the above reasons the petitioner's requests *must* be and are hereby denied.

10/ The petitioner attempts to support its request by citation to past actions by the Department of Energy, the Federal Trade Commission and the Civil Aeronautics Board. The cited actions are inapposite to the situation here. The Department of Energy case cited involved a specific statutory authorization for restitution of overcharges for oil. The two FTC cases and the CAB case all involved the use of funds to correct the specific practices which attracted the penalties in the first place.

11/ "[A]ll moneys received from whatever source for use of the United States...shall be paid by the officer or agent receiving the same into the Treasury...." 31 U.S.C. 484. See also 10 C.F.R. 2.205 (i) which requires civil penalties to be paid by "check, draft, or money order payable to the Treasurer of the United States".

A copy of this decision will be filed with the Secretary of the Commission for the Commission's review in accordance with 10 C.F.R. 2.206(c).



Richard C. DeYoung, Director
Office of Inspection and Enforcement

Dated at Bethesda, Maryland
this 28 day of May, 1982.