

RELATED CORRESPONDENCE

DOCKET NUMBER  
PROD. & UTIL. FAC. 50-255

In the Matter of  
CONSUMERS POWER COMPANY  
(Palisades Nuclear Power Facility)

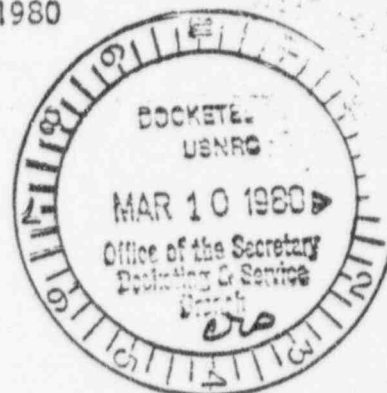
CIVIL PENALTY

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March 6, 1980

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Dear Mr. Miller:

This letter is in response to your letter of February 21, 1980, which enclosed "Consumers Power Company's First Round of Interrogatories and Request for the Production of Documents by the Nuclear Regulatory Commission". We intend to answer this and future informal discovery requests insofar as these requests encompass matters which are appropriately discoverable in this case. To the extent information you seek is relevant and necessary to a proper decision in this matter, we believe we can accommodate your request informally and it will, therefore, be unnecessary to insist on your strict compliance with the formal discovery mechanisms contemplated in 10 CFR 2.720 and 2.744 as a prerequisite to your obtaining such information.

We wish to inform you, however, that we do not intend to provide any answers to several requests made in your February 21st filing: specifically, items 2(b), (c) and (d); 3; 4; 5 in part; 6(b)(ii) in part; 7(b)(ii) in part; 8(b)(ii) in part; 9; 11 in part; 12(f) and (g); 12(i) in part; 13(f) and (g); 13(i) in part; 14(a)(iv), (v), (viii), and (ix); and 17 in part. The thrust of these questions is to delve into the thoughts of each person on the NRC staff who may have participated in the internal deliberative process that led to the decision by the Director of Inspection and Enforcement to impose civil penalties against Consumers Power Company. In our view, such an inquiry is neither relevant nor necessary to a proper decision by the Administrative Law Judge in this case. Moreover, we do not believe that the information you seek in these questions is properly discoverable.

The issues in this case do not concern the individual opinions of members of the staff in proposing the imposition or non-imposition of a civil penalty against Consumers Power Company. Those persons who may have advised or participated in the process leading to the Director's December 20th Order - indeed, including the Director himself - are not the decisionmakers in this case. It is Judge Smith who must now determine (1) whether Consumers Power Company committed the alleged violations and (2) whether civil penalties are warranted. Of course, the NRC staff has the burden of going forward on the issues in this

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case.

In this regard, let me refer you to the decision of the Atomic Safety and Licensing Appeal Board in Radiation Technology, (ALAB-567, Oct. 16, 1979), petition for review denied, January 4, 1980. In that case, the licensee argued that its due process rights had been violated, because the licensee did not have the opportunity to cross-examine the Director regarding statements made to him by other NRC personnel that led to the Director's determination to impose civil penalties. The Appeal Board rejected this argument:

"The answer to this contention is that it rests on a misconception. The Director is not the ultimate fact finder in civil penalty matters. Commission regulations afford one from whom a civil penalty is sought the right to a hearing on the charges against it. 10 CFR §2.205(d) and (e). At that hearing, the Director must prove his allegations by a preponderance of the reliable, probative and substantial evidence. It is the presiding officer at that hearing, not the Director, who finally determines on the basis of the hearing record whether the charges are sustained and civil penalties warranted." Id., Slip Op. at 6-7.

The Appeal Board went on to say:

"A licensee who thinks the Director has been ill-advised or mistaken has a remedy. It is not to cross-examine the Director's thought processes but to make him prove his case at an impartial hearing." Id., Slip Op. at 8.

Although you may be styling your argument a bit differently, the Company's position is not unlike that taken by Radiation Technology. We think, therefore, that the Appeal Board's decision is equally applicable here.

While we intend at this point to answer your remaining requests, we do not intend to waive by this letter any other objections to those requests that may become apparent upon further analysis. We also note that your requests in items 12, 13, and 14 encompass for the most part documents and records which are publicly available in the Commission's public document room. To the extent that the staff may be able to easily identify the requested materials, however, we will make every effort to accommodate your requests.

Sincerely,

*JM*  
James P. Murray  
Director and Chief Counsel  
Rulemaking and Enforcement Division  
Office of Executive Legal Director

cc: Hon. Ivan W. Smith, *Paul Murphy, Esq., Alan Bielawski, Esq., + Judd Boren, Esq.*