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August 26, 1996

James Lieberman, Director
Office of Enforcement
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Jim::

The process followed at the predecisional enforcement conference involving Houston Lighting & Power Company on July 19, 1996 in Region IV was sufficiently novel that I thought you might find it helpful to get some personal feedback on it. These are only my views, not necessarily those of my client.

The Process

As you know, the enforcement issue related to Department of Labor findings of employment discrimination. The Commission determined to hold an open predecisional enforcement conference, and then agreed with the complainants and their legal counsel to make special arrangements for them to listen to the conference by telephone. In addition, the NRC agreed to a subsequent telephone call in which the complainants' and their counsel could ask the NRC questions about the enforcement conference. The licensee was first informed of these arrangements when its representatives arrived at the NRC regional office for the conference. Licensee representatives were permitted to listen to this subsequent telephone call, during which the NRC assured counsel for the complainants that they would have the opportunity to respond to any follow-up information the licensee might submit afterward.

Open Enforcement Conferences

The NRC has been experimenting with open enforcement conferences for some time, and I know you have heard many arguments about their merits. Despite claims to the contrary, I have no doubt that the open format does affect the substance of enforcement conferences.

Because of the importance of assuring completeness and accuracy, licensees are cautious about

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their communications with the NRC at all times, regardless of whether they are in a public forum. However, when a conference is open, Licensees and the NRC both must take into account that there are other audiences and in deciding what is discussed will be forced to weigh the consequences of any discussion in both the public and NRC fora. As a result, information that is already well understood by NRC must be explained for the benefit of the public, or the presentation shortened to avoid topics or depths of discussion that are difficult to explain briefly, can be easily taken out of context, or may be perceived to be more detrimental in the public arena than the escalated violation and civil penalty. Licensees also must consider whether their discussion of candid self-assessments will be used to their disadvantage in other fora. If so, they will find it important to put deficiencies into perspective, adding information that is unnecessary for NRC's purposes and increase defensive posturing.

The presence of the public also can prevent discussion of information that cannot be disclosed to the public for various reasons. For example, in the conference on July 19, an issue was raised that the licensee had to decline to address because it is prohibited by 10 CFR 26.29 from disclosing certain information to members of the public. See Conf. Transcript at 141. In this particular instance the subject was not material to the licensee's position, but that is not always true. Whenever conferences address issues about personnel there is the potential for privacy interests to inhibit the discussion in a public forum.

Public Observation by Telephone

Allowing the public to observe by telephone made it practical for persons to hear the conference without incurring significant expense. Undoubtedly it made "observation" possible when it might otherwise would not. If NRC were to make telephone monitoring of enforcement conferences generally available to the public, it would exacerbate the difficulties inherent in open enforcement conferences because of the likelihood of press interest. In fact, if NRC continues to allow public participation by telephone, we should foresee NRC granting this access to anyone who wants to listen and expect that conferences will be "attended" by significant numbers of public and press. This is likely to shift the perceived primary audience from NRC to the public. The conferences will become media events, rather than fact gathering processes.

Consequently, licensees will be forced to handle enforcement conferences more as press briefings rather than an open dialog with the regulator.

Question Session After the Conference

Although described as a question session, it turned out to be an opportunity for the Complainants to express their views on the presentations made by the licensee. The licensee was permitted to listen. This afforded the licensee an opportunity to identify issues it should clarify for the NRC and also to learn about matters that might require additional action. As you know, in this case the licensee provided additional information to the NRC in response to the statements made by the Complainants. I understand that there also was direct communication with one of the Complainants to follow-up on concerns.

I think it is generally valuable to allow the licensee to hear the charges being raised by others. It makes it more likely that the NRC will receive the information necessary to make an informed enforcement decision. However, it is important to recognize that the NRC standards for completeness and accuracy only apply to the licensee. Thus, while the licensee is constrained to treat its every word as if it will be scrutinized for any sign of inconsistency, the members of the public are apparently not held to any standard for truthfulness. This imbalance in the process can work significantly against the licensee, who must assume that even baseless charges must be addressed because they may be given some level of credence by the NRC.

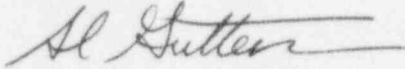
Ad hoc Procedures

As noted above, the special accommodation to the Complainants for the July 19 enforcement conference was announced to the licensee at the start of the conference. It would be helpful if the licensees were advised of the process in advance. This would facilitate logistics. (Several licensee representatives at the July 19 conference had to make last minute changes in travel plans to be able to listen to the subsequent session with the Complainants, and others were unable to do so.) Advance notice also would allow the licensee to express its views on the process contemplated by the NRC. The NRC Enforcement Policy suggests that licensees have the option of waiving an enforcement conference. The licensee should be able to make this decision based on the proposed format of the conference. If the audience is likely to be too large, a licensee may consider the risks of the public meeting as too great to justify participation in an enforcement conference. A licensee should be given enough information about the enforcement conference process to be able to make an informed decision about whether and how to participate.

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I hope these views are of some use to you. If you would like to discuss them, please call me.

Sincerely,

A handwritten signature in dark ink, appearing to read "Al Gutterman", with a long horizontal flourish extending to the right.

Alvin H. Gutterman

cc: William T. Cottle
Joseph R. Gray