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James Lieberman, Esq.
Chief Counsel, Regional Operations
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Washington, D. C. 20555

Dear Mr. Lieberman:

I thought it well to put in writing my thoughts concerning the patent inconsistency between Commission rules 10 CFR § 19.12 and §§ 19.15-19.16, and appropriate modes of resolution, in light of the need for effectuation of the objective of the "whistle-blower" statute (42 U.S.C.A. 5851; 24 CFR, Part 24, 45 FR 1836, Jan. 8, 1980), acknowledged in 10 CFR, Part 2, App. C, Supp. VII, 3.

10 CFR § 19.12 provides:

> "All individuals working in or frequenting any portion of a restricted area * * * shall be instructed of their responsibility to report promptly to the licensee any condition which may lead to or cause a violation of Commission regulations and licenses or unnecessary exposure to radiation or to radioactive material; * * *."

10 CFR § 19.15 and 19.16 provide:

> **§ 19.15 Consultation with workers during inspections.**
>
> (a) Commission inspectors may consult privately with workers concerning matters of occupational radiation protection and other matters related to applicable provisions of Commission regulations and licenses to the extent the inspectors deem necessary for the conduct of an effective and thorough inspection.

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(b) During the course of an inspection any worker may bring privately to the attention of the inspectors, either orally or in writing, any past or present condition which he has reason to believe may have contributed to or caused any violation of the act, the regulations in this chapter, or license condition, or any unnecessary exposure of an individual to radiation from licensed radioactive material under the licensee's control. Any such notice in writing shall comply with the requirements of § 19.16(a).

(c) The provisions of paragraph (b) of this section shall not be interpreted as authorization to disregard instructions pursuant to § 19.12.

§ 19.16 Requests by workers for inspections.

(a) Any worker or representative of workers who believes that a violation of the Act, the regulations in this chapter, or license conditions exists or has occurred in license activities with regard to radiological working conditions in which the worker is engaged, may request an inspection by giving notice of the alleged violation to the Director of Inspection and Enforcement, to the Director of the appropriate Commission Regional Office, or to Commission inspectors. Any such notice shall be in writing, shall set forth the specific grounds for the notice, and shall be signed by the worker or representative of workers. A copy shall be provided the licensee by the Director of Inspection and Enforcement, Regional Office Director, or the inspector no later than at the time of inspection except that, upon the request of the worker giving such notice, his name and the name of individuals referred to therein shall not appear in such copy or on any record published, released or made available by the Commission, except for good cause shown." (Emphasis added.)

Now, I consider it self-evident that the right protected in §§ 19.15 and 19.16 to approach and communicate with NRC "privately" is designed as a prophylactic rule to effectuate the policy of the "whistle-blower" statute by guarding against the danger of employer discovery of the identity of employees who complain to NRC, to the end of shielding them from

potential reprisal. One of the methods NRC uses to induce employees to reveal licensee non-compliance to NRC is a guarantee of confidentiality. An example is the complainant in this very case, Vera English. (See letter from Bradley W. Jones to the undersigned, copy attached hereto.)

It is obviously incompatible with these policies to permit a licensee who has somehow learned of the employees' confidential recourse to NRC, to demand revelation of the employee's charges and production of the evidence she submitted to NRC, or, as § 19.15(c) implies, to condition the right to "private," "confidential," recourse to NRC upon simultaneous or prior revelation of the employee's charges to her employer! Of course, the requirement of relevation to the employer destroys the guarantee of privacy to informers.

Mr. Jensen read your letter to Electro Switch Corporation as stating that "it is against NRC policy to threaten an employee with adverse action for informing the NRC of safety concerns prior to notifying the employer." (Emphasis added.) (Copy of Jensen letter enclosed.)

I cannot emphasize too strongly that NRC's authorization of imposition by licensees of responsibility upon employees "to report promptly to the licensee any conditions which may lead to or cause a violation of Commission regulations or licenses or unnecessary exposure to radiation or to radioactive material" (§ 19.12), is entirely extrastatutory, whereas the right of disclosure only to NRC and not to the employer, is firmly grounded in the "except" clause of § 19.16 (a) and the policy of the "whistle-blower" provisions of the statute. Where there is conflict between a Commission policy and an inconsistent Congressional policy, the latter must, of course, prevail.

I have suggested that a literal reading of these apparently inconsistent provisions will permit both to stand. Thus, § 19.12 requires reporting to the employer only of "any condition which may lead to or cause a violation." This language refers only to potential future violations, not existing or past violations. On the other hand, § 19.15 guarantees the right privately to communicate to NRC "any past or present condition which * * * may have contributed to or caused any violation of the Act." Thus, read grammatically, § 19.12 unmistakably refers only to potential future violations, whereas § 19.15 refers only to past and present violations. Read literally, therefore, there is no conflict.

While this is the only way to reconcile the otherwise apparently conflicting regulations as written, I recognize that it does not reach the heart of your problem. As I understand your objective, you wish to place employees, under certain circumstances, under obligation to make disclosure to the licensee of observed violations. Such an obligation can legitimately be imposed where, but only where, the employee has reason to believe that supervision is unaware of the condition resulting in or constituting the violation. Where this is so, a legitimate objective is served by requiring disclosure to the employer, for disclosure enables the good-faith licensee to correct violations of which he was unaware.

Where, however, the employee has reason to believe that the licensee is already aware of the violations, and either instigates, promotes, or sanctions them because operation in violation of NRC rules and regulations is more profitable than compliance, there is no rational basis for allowing the licensee to require the employee to disclose to the licensee what he or she has disclosed, or may disclose, to NRC. Where the licensee knows of the violations, the only purpose such a disclosure requirement could serve, or at any rate, its only effect, is ipso facto to defeat the privacy guarantee and enable the licensee to cover up, conceal and destroy evidence of the violations.

If the licensee was aware of the violation and did nothing about it until an employee blew the whistle, the licensee can have no legitimate purpose in demanding that the employee disclose to him what the licensee already knows. The only purpose served by such a demand is to defeat interests the "whistle blower" statute is designed to protect, namely, privileged private disclosure to NRC of employee-perceived violations, a privilege extended to employees in the interest of apprehension and punishment of license violators.

It follows that I would recommend that the cited regulations be interpreted to mean that the employee is not, and may not be, obligated by the licensee to disclose breaches of NRC rules or violations to the licensee if the employee has cause to believe that the licensee is already aware of them.

Not incidentally, in this case, Vera English had repeatedly complained orally to supervision and to higher authority about the specific violations she finally disclosed to NRC, without arousing the licensee's remedial interest or having it take any corrective action. Many of the violations

were committed by supervisors or by employees at the direction of supervisors. Thus she had not merely suspicion, but certain knowledge, that the licensee knew all about the violations, although it did not know how much and what kind of evidence Mrs. English had to prove them. The Area Director found that Mrs. English was discriminated against for protected activity. (Copy enclosed.)

The licensee's letter of February 14, 1984, a copy of which I sent you, must be considered and its legality interpreted, in the light of these facts.

Respectfully submitted,

Mozart G. Ratner

MGR/hej

Enclosures