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April 8, 1985

Mr. Bradley W. Jones
Regional Counsel
United States Nuclear
Regulatory Commission
101 Marietta Street, N.W.
Atlanta, Georgia 30303

Re: Vera M. English
DOL Case 85-ERA-2
NRC Case No. 7590-01

Dear Mr. Jones:

This will reply to your letter of March 19, 1985, concerning my contacts with members of the NRC staff concerning "various aspects of your concerns." (Attachment A). In the first place, as I made all of you aware from the beginning, before this case arose I had never had contact with the nuclear energy industry, nor did I have professional contact with anyone in your agency. My expertise is in labor law, constitutional law, administrative law, and trial and appellate practice, as they bear on litigation of major labor law cases.

While I have no doubt that every member of your staff is familiar with the various assignments and specific authorities of every chief and little indian, branch chief and sub-chief, in your huge bureaucracy, as an outsider, I cannot even now begin to comprehend the complexity of the various divisions, departments, sections, branches, offices, and the levels and scope of responsibility and authority - on the national level and the regional level - to which NRC, for its own administrative convenience, has divided and subdivided, sub-sectioned and cross-sectioned, pollenated and cross-pollenated the agency's work. For all of General Counsel Judge Plaine's kindness in extending to me the assistance of Mr. Neil Jensen of his staff, and making himself available when I called, it seems that every time I raised an issue on the national level, I wound up talking to a person who had little or no responsibility or authority in that area, or one who was out and too busy or disinterested to return my phone calls.

My earliest efforts, beginning in August, 1984, were designed to discover what was taking such an inordinate length of time between NRC's receipt of Mrs. English's written documentation of her charges on February 21, 1984, and charges she had made orally as early as August 29, 30 and 31, 1982 (Attachment B, Uryc Affidavit, p. 2), and issuance of reports of investigation of those charges.

The first explanation I was offered was the numerosity and complexity of the charges. That is still the excuse for non-completion of the investigation of at least twenty of the charges. (Attachment C, Puckett Affidavit, p. 5 and app.) Needless to say, I tried to bring pressure on anyone and everyone in NRC whom I thought could help to expedite issuance of investigation reports.* Had I done less, I would have been derelict in my duty to my client. On September 26, 1984, I waived Mrs. English's initial, misguided, request for confidentiality.

Mr. Abrams and you conditioned delivery to me of Reports Nos. 84-17, 84-18, 84-13, 82-16 and 82-10, upon my execution of an illegally overbroad confidentiality agreement (Attachment D). It took me quite some time, and comparison with other Reports delivered to me by NRC and still others I found in the NRC's Public Document Room, to discover that the fourth paragraph of the form covering letter forwarding each Report to G.E., designates the enclosed Report as containing so-called "10 CFR 2.790 information," if so characterized by NRC. Absence of such a reference means that the Report does not contain any 2.790 information. The covering letters in 84-17, 84-18, 84-13, 82-16 and 82-10 make no mention of 2.790.

It follows that conditioning delivery to me of those Reports upon my execution of a Confidentiality Agreement was transfer for consideration of what I was legally entitled under FOIA, and NRC's own version of FOIA, 10 CFR 2.790(a) and (b)(6), first sentence; and "Public Disclosure of Enforcement Actions," 49 F.R. 8591, VI, to receive freely, without consideration. This was garden variety deception, equivalent of sale to a stranger of the Brooklyn Bridge. Conditional delivery was also a flagrant violation of APA, 5 U.S.C. § 522. See, Re: Request for Inspection Records, FCC FOIA Control, No. 82-136 (11/24/82).

In toto, I obtained the following NRC reports either from NRC's Public Document Room or from the NRC itself:

REPORT	DATE AND NAME OF INSPECTOR	SUPERVISOR	DATE/ISSUED
81-11	9/21 - 9/25 (Franklin)	C. M. Hosey	10/26/81
82-10	5/17 - 5/21 (C. M. Hosey)	K. P. Barr	6/15/82
82-16	7/26 - 7/30 and 8/3 - 8/4 (Hosey)	Perry for K. P. Barr	8/20/82
82-18	9/7 - 7/10 (J. W. Bates)	No Signature of Approval	9/27/82
83-05	2/8 - to 2/11 (Sabados)	E. J. McAlpine	3/9/83

* Attachment C-1, pp. 1 and 2.

84-04	2/21 - 2/24 (Hosey)	K. P. Barr	3/23/84
84-05	3/26 - 3/29 (Todd, Bates)	E. J. McAlpine	5/9/84
84-07	6/18 - 6/21 (Stoddard)	D. M. Collins for D. M. Montgomery	7/12/84
84-08	6/25 - 6/28 (Bates)	D. W. Jour for E. J. McAlpine	7/19/84
84-10	7/9 - 7/13 (Kahle)	E. J. McAlpine	7/27/84
84-13	9/17 - 9/21 (Perry)	Albright for G. R. Jenkins	11/15/84
84-15	11/3 - 11/16 and 12/3 - 12/7 (1984) (Clay)	E. J. McAlpine	2/7/85
84-16	11/27 - 11/30 (1984) 1/14 - 1/16 (1985) (Bates)	E. J. McAlpine	2/13/85
84-17	11/27 - 11/30 (1984) (Hosey)	D. M. Montgomery for G. R. Jenkins	1/31/85
84-18	12/17 - 12/21 (1984) (Decker)	W. E. Cline	1/31/85

Although I was known to be counsel for the Complainant in a DOL "whistle-blower" suit (10 CFR 2.790 (B)(6)), no report containing so-called 2.790 information was furnished to me, as the law requires, in two versions: one expurgated, with so-called security/safeguards, "confidential" and "proprietary" information deleted, and one unexpurgated. APA, 5 U.S.C. § 522(a)(2)(A), (4)(B), and (b)(1)(A);* 10 CFR 2.790(a), (b)(6). Of course, this was necessary to satisfy your statutory duty to make publicly available all parts of documents not containing "privileged" information and to enable me to determine relevancy of any expurgated parts, and, if it appeared necessary, effectively to exercise Mrs. English's statutory right to challenge in court NRC's classification of the expurgated parts as containing "security/safeguards," "confidential" or "proprietary" information. Timely delivery was necessary to enable me to secure a decision while DOL Case No. 85-ERA-2 was still pending.

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* "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."

On February 21, 1985, I asked Mr. Abrams for such expurgated copies. I told him trial in the DOL case would resume on March 18, 1985, and adjourn on March 28, 1985. He promised to supply the expurgated copies as soon as possible. (Attachment E, Letter, Abrams to Ratner, 2/28/85; and Attachment F, Letter, Ratner to Abrams, 3/4/85). For the individual who designated the Reports as containing 2.790 information, it should have been the work of an hour to expunge the parts so characterized from the Reports. Although the trial ended on March 28, 1985, to this date, not one has arrived. I also wired you for a copy of G.E.'s Reply to violations found in Report No. 84-17, due NRC March 3, 1985. You did not even respond to that request.

This history of non-performance cannot be ascribed to the burden of compliance with my requests to the Director, Office of Administration, for production of NRC file materials, dated February 25, 1985, March 7, 1985, and March 14, 1985 (Attachments G, H, I). That burden, as Mr. Abrams told me, had been assigned to you. Absent that excuse, the inescapable inference is that NRC knowingly and deliberately delayed transmission of the expurgated copies until after the trial was over.

On March 1, 1985, Judge Brissenden, without explanation, entered a broad confidentiality order (Attachment J). At the opening of the hearing, when, in compliance with that order, I moved the admission into evidence of all reports which are on file in the NRC Public Document Room, together with the Petition and Chapter I, filed in English v. General Electric Company and NRC, NRC Case No. 7590-01, Judge Brissenden declined to receive them except in confidence. He then announced that Mrs. Cuoco had called him ex parte and asked that he keep "confidential" all reports, including those currently on file in the Public Document Room, and those which were subsequently removed from that file.

When I protested that Mrs. Cuoco's request was flagrantly illegal, being in irreconcilable conflict with FOIA, 5 U.S.C. § 552(b)(3) (last sentence), and that it unconstitutionally deprived Complainant of her right to a "public" trial, in violation of Due Process, Equal Protection, and the APA, Judge Brissenden ruled that he had given Mrs. Cuoco his word and would abide by his agreement. In deference to Judge Brissenden, but, of course, to the immense profit and delight of G.E., and to the extreme detriment and justified chagrin of my client, Mrs. English, I did not release to the press any of the matters on file in the Public Document Room.

On March 21, 1985, with only one day left for Plaintiff's case in chief, Lillian M. Cuoco, "Counsel for NRC Staff," wrote Administrative Law Judge Brissenden as follows:

> "Several of the inspection reports which Mr. Puckett enclosed with his affidavit may contain information which is protected under 10 CFR 2.790 of the Commission's regulations. I would ask that you take appropriate measures to ensure that these inspection reports are not publicly released unless you are otherwise notified. It is my understanding that both General

Electric Company and Mr. Ratner have copies of these inspection reports. Accordingly, copies of these reports have not been included with the copies of Mr. Puckett's Affidavit forwarded to GE and Mr. Ratner. The NRC's review of Mr. Ratner's 2.206 Petition and supplements (Exhibits C-29, C-30 and C-31) to determine whether protected information is contained in these documents has not yet been completed. I am advised that this review will take several more days. In the meantime, I would ask that you continue to treat these documents as safeguards information. I expect that the staff will complete its review by early next week." (Attachment K). (Emphasis added.)

On the next to last day of trial, Mrs. Cuoco advised Judge Brissenden by phone that the "Staff" had decided that the referenced exhibits (Attachments L, M and N hereto), in NRC Case No. 7590-01 did indeed contain "protected information."* It is impossible, of course, that these analytical submissions by the undersigned contained only "protected information." Yet, the "Staff" released no parts from the ban. This establishes that NRC's lawlessness is not inadvertent, but a product of deliberate policy designed to protect G.E. and NRC illegitimate interests against the public interest.

Failure to deliver the long promised expurgated copies during the trial, and refusal to release Exhibits C-29, C-30 and C-31 deprived Mrs. English of the opportunity publicly to offer expurgated copies into evidence in Case No. 85-ERA-2, and to distribute such copies to the press. Non-delivery, pro tanto, unconstitutionally and illegally (29 CFR § 18.43; 48 F.R. 32547) deprived Mrs. English of the right to a public trial, and to freedom of speech and of the press. The request to Judge Brissenden to impose a broad confidentiality order on the ground that these documents "may" contain 2.970 information was itself illegal, being in irreconcilable conflict with 5 U.S.C. § 552(b), last sentence.

We now turn to administrative delay in the handling of Mrs. English's charges. Whether one attributes NRC's foot dragging over a year on twenty of the written charges to administrative lethargy, inertia or laxity, it is impossible to reconcile with NRC's APA duty, 5 U.S.C. § 555(b), "to conclude a matter presented to it***within a reasonable time***with due regard for the convenience and necessity of the parties." Blankenship v. Secretary of HEW, 587 F. 2nd 329-333 (9 Cir., 1978); Nader v. FCC, 520 F. 2nd 182, 206 (D.C. Cir., 1975); Environmental Defense Fund, Inc. v. Hardin, 428 F. 2nd 1093, 1098-1099 (D.C. Cir., 1970); Silverman v. NLRB, 543 F. 2nd 428 (2 Cir., 1976).

As I emphasized at all times in my contacts with all of you, Mrs. English's necessity for extraordinary speed was both unique and particularly pressing. DOL found, after investigation, that there was reasonable cause to believe that Mrs. English had been discriminatorily transferred out of G.E.'s Chemet Lab and ultimately discharged from its Nuclear Manufacturing Department, by G.E.'s top plant management, because she had engaged in activities protected by Section 210 of ERA. (Attachment O, Letter, Lawson to Lees, 10/2/84).

* C-29, the Petition, has never been removed from the Public Document Room.

This is an NRC Severity Level I Violation. 49 F.R. 8593, March 8, 1984, VII A, 4. There are but a handful of cases arising each year under all the federal "Whistle Blower Protection" statutes administered by DOL combined (45 F.R. 1836, January 8, 1980, § 24.1). That is evident from the number Mrs. English's case was assigned by DOL, 85-ERA-2. This means that as of the date of filing, August 24, 1984, it was only the second case of this kind to reach the assignment of a number stage in DOL FY 1985. Obviously, NRC's APA obligation, 5 U.S.C. §555(b), applied with particular force to Mrs. English's virtually unprecedented, urgent, need.

Second, the 10 CFR 2.206 Petition, with Chapters I and II, which Mr. Schiller and I filed on behalf of Mrs. English, was apparently, from the number assigned to it - 7590-01 - the first such whistle blower case NRC had ever had to confront. This Petition challenges the accuracy, competence and integrity of Investigators' Reports for non-application of ALARA and other reasons; and the improper assignment of Severity Levels by the Regional Director for wholesale disregard and flouting of NRC official enforcement policy and objectives.

Within a month after I first contacted NRC, Mrs. English's trial before Judge Brissenden had been scheduled to begin. However, an attempt to resolve before trial the issue whether complainant was entitled to a default judgment for failure of defendant to file a timely answer, which might have resulted in avoiding a trial, caused postponement of the opening to December 17, 1984.

On November 1, 1984, when I thought the DOL hearing would begin on November 8, 1984, I wrote Mr. E. Neil Jensen, requesting him to designate an NRC official to testify as an expert witness in Mrs. English's behalf. (Attachment P, Letter, Ratner to Jensen, 11/1/84).

In it, I said, in part:

"The reasons for this request are as follows: (1) We have reason to believe that G.E. will seek to defend on the ground that Mrs. English's charges were captious and insignificant, and that they therefore could not have so disturbed the Company as to provoke discriminatory retaliation against her. We expect G.E. to produce nuclear expert witnesses to support their version.

Of course, neither complainant nor her counsel have any expertise in nuclear science, and such expertise is unavailable to us. It is simply indispensable, therefore, that an NRC expert attend and testify at the trial that Mrs. English's charges were highly significant and dangerous to G.E. This can be established by the seriousness and length of the investigation NRC launched upon Mrs. English's charges; the significance of the findings in the four NRC decisions already issued; the number and kind of outside experts NRC has devoted to the investigation and the length of time the still continuing investigation has taken. Any further

details the witness would be authorized to disclose would also be most helpful.

Second, we must have a witness who can counter any lies or misrepresentations as to technical matters which G.E.'s experts may testify to."

On November 6, 1984, Mr. Jensen, by letter, denied my request. (Attachment Q, Letter, Jensen to Ratner, 11/6/84). He said, in relevant part:

"Normally, the NRC does not provide expert witnesses to testify in third party litigation because of the drain on NRC resources necessarily involved. Here, for example, a professional employee would be called away from his or her duties for a three-day period.

We see no reason in the circumstances of this case to depart from this policy. No NRC determination has yet been made concerning the significance of Mrs. English's allegations since the investigation is not complete. The length and scope of the investigation are a reflection of the volume of the allegations rather than their significance. No charges have been found to warrant immediate action. Thus an NRC employee would not be able to testify with respect to the significance of her charges. Moreover, their significance or lack thereof is at best tangential to the real issue in the case - whether Mrs. English was removed as a result of her contacting the NRC. See 10 CFR § 30.7(a)(2). Thus the value of NRC expert testimony would appear to be quite limited and perhaps irrelevant."

On March 11, 1984, Judge Brissenden, at my instance, authorized issuance of subpoenas ad testificandum to J. Philip Stohr, Director of Region II and Bruno Uryc, Jr., Investigative Coordinator Region II. They were served the next day. On March 14, 1985, I called you to inquire whether NRC would permit these officials to honor the subpoenas. You told me you were still waiting for an answer from NRC's legal "Staff" in Washington. Not having heard from you by 1:30 p.m. on Friday, March 15, 1985, I called Mrs. Cuoco and left word for her to return my call. She did not do so.
At 4:00 p.m., after the third try, I finally reached her. She informed me that "the Staff" had decided not to permit Messrs. Stohr and Uryc to honor the subpoenaes, but had decided instead to have her appear before ALJ Brissenden at the appointed hour, on Tuesday, March 19, 1985, and submit affidavits from the two named individuals. Since I had never spoken to either gentleman on the subjects which I intended to interrogate them about, no affidavits from them could conceivably be responsive to the relevant and material questions I would have, if permitted to do so, put to them. I advised Mrs. Cuoco that "the Staff's" position in refusing to permit Messrs. Stohr and Uryc to appear in person constituted an arbitrary, capricious and discriminatory denial of due process and equal protection to my client, particularly because, in Silkwood

v. Kerr-McGee Corp., 485 F. Supp. 566, 586 (W.D.Okla., 1979), cited with approval in Silkwood v. Kerr-McGee Corp., ____ U.S. ____, 52 L.W. 4043, 4044-4045 (1/11/84), the defendant, without objection from NRC, called two NRC officials as company witnesses, one "a regional director of the NRC." 485 F. Supp., at 586. (Attachment R).

On March 16, 1984, Mrs. Cuoco presented Affidavits from Messrs. Stohr and Uryc, offered to allow them to testify if Judge Brissenden so ordered, but argued that Silkwood is distinguishable from English because Silkwood was a suit based on state law against an NRC licensee for punitive damages. That, however, is not, even arguably, a rational basis for legal distinction. The necessity of NRC official testimony in a private proceeding does not depend on the substantive law relied on or the remedy sought, but only upon the relevance and materiality of NRC officials' testimony to the issues, of fact or law, or both, whatever those issues may be. NRC's attempt to justify the difference in its permission of officials to testify in Silkwood, but not in English, is a confession that the NRC's policy arbitrarily discriminates in favor of miscreant employer licensees and against victimized employees who are punished by their employer for engaging in Congressionally protected activity. This NRC policy perverts the policy of § 210, 42 U.S.C. § 2011, and 42 U.S.C. § 5851. As a matter of law, employees victimized for engaging in conduct protected by § 210, are entitled to NRC's support and assistance, in every conceivable way, in prosecuting their DOL case, for in their capacity as party plaintiff in such a case, they are performing their Congressionally assigned duties as "private attorney general." E.E.O.C. v. Associated Dry Goods Corp., 449 U.S. 590, 603-604 (1981).

In her role as private attorney general for enforcement, Mrs. English is entitled by law to full cooperation and assistance from NRC in proving her case. Effectuation of the objective of §210, and the entire statutory scheme for enforcement, requires that NRC freely and timely furnish to Mrs. English any and all relevant documents in NRC files, and freely offer to Mrs. English the testimony of its knowledgeable witnesses whom she desires to call. Whether or not NRC is required to allow licensees who are alleged to have violated NRC regulations to call NRC officials to testify in private litigation on behalf of such licensees, NRC is certainly required to permit such officials to appear in person and testify in DOL cases involving enforcement of § 210, on behalf of complainants.

Let us now examine NRC's discriminatory policy in light of the excuses Mr. Jensen advanced in his letter of November 6, 1984, supra, p. 9. NRC authorized its officials to testify in behalf of Kerr McGee despite "the drain on NRC resources necessarily involved." Moreover, by the time Stohr and Uryc were subpoenaed to testify, a sufficient number of reports had issued (Attachment S, Stohr Affidavit) so as to enable "an NRC employee to testify with respect to the significance of (Mrs. English's) charges." (Emphasis added.) Presentation of the Stohr and Uryc Affidavits as a substitute for their testimony enabled NRC to evade examination of its officials by Plaintiff's counsel on the "significance" of the NRC reports sustaining Mrs. English's charges,

and that, of course, is precisely why "the Staff" tried the gambit of presenting affidavits, rather than producing Messrs. Stohr and Uryc in person. To be sure, preclusion of the testimony of Messrs. Stohr and Uryc served not only G.E.'s illegal interest, but also NRC's illegal interest in covering up its own malfeasance. But, that makes the vice of the maneuver not better, but worse.

Finally, Mr. Jensen asserted that the "significance or lack thereof [of the NRC's findings on Mrs. English's charges] is at best tangentical to the real issues in this case..." Mr. Jensen's ignorance may well be forgiven; after all, he is not, and does not pretend to be, a labor lawyer. But his arrogance in expressing an opinion on a matter as to which he should realize that he knows less than nothing, is so unprofessional as to be unforgiveable.

It has been the insight and perception of Plaintiff's counsel, from the beginning, that the real question in the English case would be, why should so powerful and prestigious a corporation as G.E., with net assets exceeding twenty-one and one-half (21 1/2) billion dollars, engage in outrageous and unspeakably humiliating conduct to compel Mrs. English "voluntarily" to resign, and, failing that, demote her in disgrace from the Chemet Lab to a job with only menial tasks in Building J and then in Customer Stores; put her under high management surveillance (by Mr. Ogle, Quality Control and Customer Services Team Member, (C-61, p. 4) (Attachment T)), every moment while at work and even when she left town to visit her lawyer and the NRC Atlanta Regional Office; isolate her from all fellow women workers at lunch time; at the direction of a high management personnel official, on her last day of work, have her sent home for safety shoes when no one else doing comparable work in Customer Stores was ever required to wear safety shoes; and ultimately fire her, ostensibly for lack of work, merely because she had filed charges with the NRC of safety and quality control violations by her employer and had obtained and preserved hard evidence to prove her charges? If the consequences of finding the charges true were insignificant, and the possible penalty negligible, taking into account the net worth of the corporation, Mrs. English's entire story might be discredited as "implausible" — because inconsistent with common sense observations of rational business behavior. Anderson v. City of Bessemer City, North Carolina, ___ U.S. ___, 53 L.W. 4314, 4317, 4318, March 19, 1985. The danger was particularly great because the G.E. nuclear plant management had never before removed any employee from the Chemet Lab for any kind of offense, and had never before discharged an employee for cause. In this respect, I particularly feared the possibility of upset by the Fourth Circuit of a decision by the ALJ and the Secretary of Labor in Mrs. English's favor. In my experience, Courts of Appeals do not hesitate to reverse even record supported findings of ultimate fact, if they consider the result "implausible on its face." Id.

And so it was that the undersigned Plaintiff's counsel devoted untold time and effort from August, 1984, through the date of this writing, and will continue to do so, to (1) expediting issuance of NRC reports; (2) instituting and relentlessly pursuing NRC Case No. 7590-01 challenging Reports thus far

issued insofar as they arbitrarily and illegally downplay the significance of violations found and arbitrarily and illegally fail to find and fail to assign appropriate severity levels to found violations; (3) searching out and familiarizing with the facts of this case, a renowned nuclear health physicist to testify as an expert witness about the real significance of the Report findings, which the Reports themselves carefully conceal; (4) invoking and exhausting every legal procedure available to compel to testify on that subject those NRC officials who could, I thought, throw most light upon the real significance of the findings, the failure of investigators to apply the ALARA "standard" [10 CFR § 20.1(c)], and the Regional Director's assignment of the lowest Severity Levels to even repeated and multiple violations within a two-year period.

Fortunately, Judge Brissenden was not fooled by Mrs. Cuoco's representations. Before deciding whether Messrs. Stohr and Uryc would be required to testify, he directed her to produce an affidavit disclosing the method of assignment of Severity Levels generally, and, as applied to the Reports in this case, to disclose the reasons only Severity Levels "of minor concern" had been assigned to the G.E. violations found on Mrs. English's charges. On March 22, 1985, the last day left under Judge Brissenden's order for presentation of plaintiff's case, he and counsel for the parties were served with an affidavit signed by John M. Puckett, Director, Enforcement and Investigation Staff, NRC Region II, who claims to have responsibility for "administration of the NRC Enforcement Program in Region II" and who admittedly participated in that capacity "in the inspection and enforcement process" involving Mrs. English's charges. Before receiving that affidavit, I had not been apprised by you, or anyone else, of Mr. Puckett's existence. (Attachment C, Puckett Affidavit).

The Puckett Affidavit is another classic snow job. It does not even disclose the fact (which I wormed out of Mr. Clay in the telephone conversation which is the subject of your letter), that inspectors have nothing whatsoever to do with assignment of Severity Levels. Those are assigned by a three-member committee, headed by Mr. Stohr, with Mr. McAlpine and Mr. Jenkins as members. McAlpine, whose lofty title is Chief, Material Control and Accountability Section, Safeguards Branch, supervises all inspections of Quality Control. His counterpart is G. R. Jenkins, Section Chief, Division of Radiation Safety and Safeguards. He supervises all inspections of Radiation Safety Violations. It is these three, we have reason to believe, who are historically principally responsible for the inadequency, incompetence, failure to inquire into ALARA facts and facts on which application of NRC enforcement policy depends, and who may have taught their inspectors to minimize the significance of G.E. violations, or may even have revised draft inspection reports to downplay the significance of G.E.'s found violations. Without cross-examining them under oath, of course, we cannot confirm these suspicions. Had Stohr been required to admit under oath that McAlpine and Jenkins were members of the three-man committee that assigned Severity Levels to the G.E. reports based on Mrs. English's charges, we would, of course, have demanded that McAlpine and Jenkins also appear for examination under oath.

The tactic of presenting the innocuous Puckett Affidavit was designed to obstruct and block this NRC-feared eventuality.

The Puckett Affidavit is so vague and general, and the process of assigning Severity Levels it describes is so amorphous, as to make it utterly useless in ascertaining the process by which Severity Levels were actually assigned to the violations found on Mrs. English's complaints, let alone the rationale and significance of the Severity Level assignments. We do not contend that the chart attached to the Puckett affidavit is irrelevant or unhelpful. Indeed, it is useful in showing NRC's progress, and lack of it, in investigating Mrs. English's charges. It even shows the violations found and not found in unreleased Report No. 85-02. That Report was shown to G.E. management in an exit interview, but has been withheld from the Complainant's counsel on the pretext that "review" has not been completed. In the context of Judge Brissenden's Order, which required NRC to explain the method, process and rationale by which Severity Levels were assigned to the violations found on Mrs. English's charges, the chart is only a substitute for compliance.

Nor can this evasion of Judge Brissenden's Order be justified on the implicit theory of paragraph 5 of Puckett's Affidavit, pp. 4-5, namely, that the possibility of revision instigated by plaintiff's counsels' 2.206 proceeding defeats "finality" and renders inappropriate at this stage consideration of how and why Severity Levels were assigned to the violations found in the issued Reports. This notion that the possibility of reversal in review proceedings destroys the "finality" of an order for APA purposes has been authoritatively rejected. 5 U.S.C. § 551(6), (13); § 552(b)(2)(A); American Mail Line, Ltd. v. Gulick, 411 F. 2nd 696, 702, n.11 and accompanying text (D.C. Cir., 1969).

When the Government offers affidavits instead of live testimony in response to a subpoena, the burden of proof is on the Government to overcome the issuer's challenge that the affidavit does not cover, or cover adequately, the issues relevant and material to the case. Brandon v. Eckard, 569 F. 2nd 683, 688-690 (D.C. Cir., 1977); St. Louis Post Dispatch v. F.B.I. 447 F. Supp. 31 (D.D.C., 1977); Ramo v. Department of Navy, 487 F. Supp. 127 (N.D. Cal., 1979). As we have seen, the Puckett affidavit is carefully framed to avoid touching the key issue of "significance."

Moreover, the demand for confidentiality of all inspection reports and all other documents contained in Mrs. Cuoco's letter to Judge Brissenden of March 21, 1985, is outrageously and indefensibly illegal. Her claim is that several of the inspection reports enclosed with Mr. Puckett's affidavit "may contain" information protected by 10 CFR § 2.790. What those documents "may contain"is, as a legal matter, an utter irrelevancy. The Government's burden of sustaining a privilege claim can be carried only by actual concrete proof, not by generalization or conclusory allegation, that documents do, not merely that they "may", contain information exempt from disclosure. Moreover, if the Government does not contend and prove that the entire documents consist only of exempt information (Goland v. C.I.A., 607 F. 2nd 339 (D.C. Cir., 1978),

Dames & Moore v. Department of Treasury, 544 F. Supp. 94 (D.C. Calif., 1982), the Government is required by law to separate those portions which do not contain exempt information from those which do. Dept. of Air Force v. Rose, 425 U.S. 352, 374-382 (1976); Church of Scientology v. U. S. Department of The Army, 611 F. 2nd 738 (9 Cir., 1979). This obligation NRC repeatedly flouted.

In any event, whether or not NRC regional officials concede it, the reports themselves speak volumes of "significance" to Professor Kenneth Mossman. Upon the inferences he was able to draw from the subsidiary findings, G.E.'s treatment of Vera English makes perfect sense. When Mrs. English filed and substantiated her charges, G.E. must have realized that it faced a potential threat of hugh fines (49 FR 8583, 8587, 8591, Table 2), going back to at least February, 1981.

> "In cases involving willfulness, flagrant NRC identified violations, repeated poor performance in an area of concern, or serious breakdown in management controls, NRC intends to apply its full enforcement authority where such action is warranted, including appropriate orders and assessing civil penalties for continuing violations on a per day basis, up to the statutory limit of $100,000 per violation, per day." (49 FR 8589, "B. Civil Penalty")

See, also, 49 F.R. at 8590, Table 1A, Base Civil Penalties (d); Table 1B, Base Civil Penalties. Under the rubic "c. Orders," NRC enforcement policy states (49 FR at 8590):

> "In considering prior performance, prior enforcement history, including previous Severity IV and V violations in the area of concern, and escalated enforcement actions will be considered."

Under the caption "c. Enforcement history," 49 FR 8585 states:

> "***a civil penalty can be doubled if a similar violation occurs within a two-year period."

***

> "The Commission believes that escalation of a penalty may be appropriate where multiple examples of a violation are identified, regardless of who identifies them."

Finally, the Commission is authorized, 49 FR 8585,"c" 4, 8591, VII "Responsibilities," (2), "to impose civil penalties in amounts greater than

three times the Severity Level I values shown in Table I." The possibility of a fine of that size, coupled with the threat of loss of G.E.'s license, 10 CFR 20.601, quite credibly explains G.E.'s treatment of Mrs. English for filing charges and documenting and substantiating those charges against G.E. with the NRC.

When the chips were down, at the end of the trial, G.E.'s principal defense emerged: Mrs. English was not to be credited because (a) NRC allegedly found no merit in any of her charges (Attachment U, ALJ 11, Rejected Exhibit offered by G.E., identified for reference purposes only, Pages 2-4); (b) such findings of violation as NRC made against G.E., not based on Mrs. English's charges (Id., Pages 4-9), are of the insignificant Severity Level IV and V variety, carrying no fines and providing no rational motive for G.E.'s alleged discrimination against Mrs. Engligh for protected activity and (c) Mrs. English's complaints of harassment, degradation, humiliation and discrimination are a figment of imagination and the result of a persecution complex. So much for Mr. Jensen's "irrelevant and immaterial" bilge.

I turn now to the vicious implication in your letter, that I somehow acted improperly "by having a third individual, who was not an attorney, [Buddy Lewis] initiate the contact, talked to a member of the NRC Region II technical staff [Ed Clay] concerning information on his NRC responsibilities." Preliminarily, I talked and corresponded with far more attorneys within NRC than you named about "various aspects of [my] concerns." Thus, for example, on various matters, I talked and corresponded with your General Counsel, Judge Herzel E. Plaine, and two members of his staff, Mr. Neil Jensen and Mr. Sebastian Aloof. Second, the matters on which I sought information from your technical staff were matters on which I not only did not, as you erroneously imply I could, receive "complete and timely responses" from the NRC legal "Staff"; experience taught me that I would, from that Staff, receive no information at all.

You did your best at all times, as you admit, to quarantine your technical staff against any inquiries from me. For example, whenever I called Mr. Uryc, we exchange pleasantries, and that is all, until he refered me to you. Obviously, every member of the technical Staff was conditioned not to accept a phone call from me.

You may take pride in having so insulated your technical staff. But you could hardly expect me, if I refused to accept your unilaterally imposed restriction, as I did, to go about obtaining information relevant to Mrs. English's case by means which would guarantee failure. I asked Buddy Lewis to call Clay because Clay would think Buddy was bringing him information. When I got on the line, the tables were simply turned. To be sure, Clay was reluctant to talk, and threatened to tell his supervisors all about what I said. I told him that he might be under obligation, as a faithful employee, to do just that, and proceeded with the conversation. During its course, he revealed, no doubt in self-defense, that inspectors have nothing whatever to do with assigning Severity Levels to violations they find, and he

explicitly named those who do. That was invaluable information, which I am sure your legal "Staff" would never have provided me.

Now, I put it to you, that to impose on the NRC technical staff a gag rule against talking to lawyers who represent ERA protected "whistle-blowers," and who are known to be investigating nonfeasance, misfeasance and malfeasance by Region II chiefs, supervisors, and inspectors, is a Mafia tactic. The principal reason I am sending a copy of this letter to the respective Chairmen of the concerned Senate and House Committees is to alert them to your attempt to cover up the apparent misconduct of Region II officials and employees. The other reasons are that I wish to bring to their attention the NRC's multiple violations of ERA, 10 CFR, and APA in their treatment of the English case.

I appreciate that you may think you have a legal defense based on FOIA, Exemption (b)(7)(E). But you don't. Cf. Department of Air Force v. Rose, supra, 425 U.S., at 360-370. "Despite its broad language, the legislative history of this provision reveals that it was not meant to exempt all investigative procedures and techniques from disclosure." Docal v. Bennsinger, 543 F. Supp. 38, 48 (M.D. Pa., 1981). When NRC officials and employees come under suspicion because of the way they perform their "NRC responsibilities" they are no more immune from investigation by legitimately concerned private attorneys general than is the President of the United States. United States v. Nixon, 418 U.S. 683, 703 (1974).

Very truly yours,

Mozart G. Ratner
Counsel for Vera M. English

MGR:jw

Attachments

INDEX TO ATTACHMENTS

Attachment K - Letter to Judge Robert J. Brissenden from Lillian M. Cuoco, Counsel for NRC Staff, March 21, 1985

Attachment L - Motion to Institute Proceeding Pursuant To 10 CFR 2.202, For Imposition of Civil Penalties and to Vacate and Reverse Inspection Reports and to Schedule Hearing Thereon, December 13, 1984

Attachment M - Supplemental Petition Under 10 CFR § 2.206 For Withdrawal of Reports 84-17 and 84-18, Issued January 18, 1985; Issuance of New Reports Correctly Documenting and Finding Alleged Violations at the Wilmington Facility Identified Herein; Issuance of Notice of Violation On All Substantiated Allegations, Assignment of Appropriate Severity Levels to Each Found Violation, and Commencement By NRC of Appropriate Enforcement Action, Including the Assignment of Civil Penalties, February 28, 1985 (Chapter I)

Attachment N - Supplemental Petition, etc., Chapter II.

Attachment O - Letter of Determination of Probable Cause from James C. Stewart, DOL Area Director, to E. A. Lees, General Plant Manager, G.E., Wilmington, N.C., October 2, 1984

Attachment P - Letter from Mozart G. Ratner to E. Neil Jensen, November 1, 1984

Attachment Q - Letter from E. Neil Jensen to Mozart G. Ratner, November 6, 1984

Attachment R - Excerpt from Opinion in Silkwood v. Kerr-McGee, 52 L.W. 4044-4045 (U.S. Supreme Court, decided January 11, 1984)

Attachment S - Affidavit of J. Philip Stohr, Director of the Division of Radiation Safety and Safeguards, NRC Region II, March 15, 1985

Attachment T - Letter from F. J. Wieczorek, Consulting Engineer, Analytical & Test Methods, Quality Assurance & Reliability Operation, General Electric, San Jose, California, to E. A. Lees, Manager, Quality Assurance, Wilmington Manufacturing Department forwarding Quality Assurance Review of Employee Allegations of Violations to Company Practices and Procedures, April 26, 1984 (Wieczorek Report)

Attachment U - G.E. Rejected Exhibit (ALJ 11) - Allegations Reported by Vera M. English to the Nuclear Regulatory Commission in December 1983 And February 1984