From: <wbaer@morganlewis.com>
To: <mlt@nrc.gov>
Date: 1/28/02 4:42PM
Subject: Comments on Use of Alternative Dispute Resolution inEnforcement Proceedings

Dear Mr. Lesar -- Attached please find our comments on use of Alternative Dispute Resolution in Enforcement Proceedings. I am also sending you a copy of these comments by regular mail. Bill Baer

10/17/01
66FR 64890
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(See attached file: Morgan Lewis ADR Comments.pdf)

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January 28, 2002

Mr. Michael Lesar
Chief, Rules and Directives Branch
Office of Administration
U.S. Nuclear Regulatory Commission
Mail Stop T-6 D59
Washington, DC 20555-0001

Re: Request for Comment on Use of Alternative Dispute Resolution in the NRC's Enforcement Program

Dear Mr. Lesar:

These comments are being submitted on behalf of PPL Susquehanna LLC, South Texas Project Nuclear Operating Company, and TXU, Inc. We strongly support the Commission's initiative to make Alternative Dispute Resolution (ADR) processes available, on a voluntary basis, in NRC Enforcement Actions. We believe that, in appropriate cases, such processes can result in resolution of enforcement actions in a manner that is fairer, more candid, more timely and more efficient than the current process. Also, where corrective action is warranted, the use of ADR can result in the development and implementation of more timely and effective corrective and preventive actions that are mutually agreeable to both the agency and the licensee.

The comments provided by the Nuclear Energy Institute provide a more detailed basis for developing policies and regulations that would result in an effective ADR program in enforcement cases, and we endorse those comments. In particular, as urged by NEI, the NRC should adopt ADR procedures which provide for:

- Flexibility – Several alternative processes, such as binding arbitration, non-binding arbitration, and mediation should be made available. The NRC and the licensee should be able to choose among these processes and agree upon the one to be used in a particular enforcement matter. Also, flexibility should be provided as to when

ADR can be requested and initiated (*e.g.*, both before or after an enforcement conference, at the time of reply to a proposed violation, or upon commencement of a hearing). Finally, there should be considerable flexibility for the parties to agree upon outcomes, which we believe will promote a less adversarial approach and lead to more timely corrective and preventive measures where warranted.

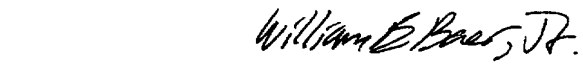
- Certainty – The Commission should adopt regulations stating that it will adopt and confirm the results of binding arbitration, or mediated settlements, absent some gross irregularity such as fraud in procuring the decision or settlement, tainted neutrals, or a clear error of law. This will provide the certainty needed for parties to support the use of ADR and mitigate concern that participation in ADR could be a waste of time, money, and effort.
- Availability of Neutrals -- While we do not oppose the training of certain Staff personnel to facilitate ADR, we believe that each ADR option should also allow the selection of arbitrators or mediators from a pool of individuals not affiliated with either the NRC or the licensee. This will provide greater confidence among licensees and other parties that the results of arbitration or mediation are fair and unbiased.
- Confidentiality – Confidentiality is essential to promote candid dialogue in which both sides can freely discuss the strengths and weaknesses of their positions and propose potential compromises. Also, without assurance that their participation in ADR will not lead to additional publicity or consequences in other proceedings, licensees are likely to be unwilling to support the use of ADR, thus eliminating the potential benefits of efficiency, timeliness, cooperation, and implementation of rapid and effective corrective action that ADR can otherwise afford.
- Application to Discrimination Cases – Enforcement actions under 10 C.F.R. 50.7 and similar regulations may particularly benefit from ADR. The current investigation and enforcement regime for these cases is slow, expensive, and secretive; chills communication; does not foster prompt corrective and preventive action; and does not attempt, in any meaningful way, to remedy the breakdown in supervisor-employee relations that is the cause of the large majority of these cases. Use of ADR could radically improve the effectiveness of the NRC in addressing these cases.

Finally, and most importantly, the Commission must take the initiative to vigorously promote the use of ADR in enforcement actions. The NRC's current policy has permitted the use of ADR in enforcement cases for many years, but it has almost never been employed. Unless both the Staff and licensees are encouraged to use ADR, and provided with specific directions and support in selecting appropriate ADR options in particular cases, the potential benefits of ADR will not be realized. We urge the Commission to provide the Staff with specific direction and incentives encouraging the use of ADR whenever possible.

Morgan Lewis
COUNSELORS AT LAW

We would like the opportunity to provide more detailed comments in the event that the Commission prepares a proposed rule or policy statement on the use of ADR in enforcement cases. In the interim, should you require any more information or wish to discuss these comments, please call me at (202) 739-5454.

Sincerely,



William E. Baer, Jr.

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