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December 13, 1993

Mr. James Lieberman
Director, Office of Enforcement
U.S. Nuclear Regulatory Commission
One White Flint North
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11555 Rockville Pike
Rockville, MD 20852

Dear Jim:

Thank you for your reply to my November 9, 1993 letter regarding potential criminal prosecutions based on violations of 10 CFR § 50.7. I apologize if I misinterpreted your comment in Phoenix, or made more of an "off the cuff" remark than was intended. The reason I wrote to you about the Saporito case is two fold. First, I believe it is one of the clearest examples in which the threat of criminal prosecution will chill action by line managers in assuring compliance with all NRC regulations. No supervisor will ever take otherwise justifiable action under NRC's fitness for duty or access authorization regulations against an employee that also has raised safety concerns, once they understand that the risk of being second guessed is criminal prosecution. Similarly, any lawyer will be remiss in not advising decision makers of such a risk. The net effect is that persons engaged in protected activity will become a special class of workers not bound by NRC regulations in the same way as all other nuclear power plant workers.

Second, I wanted to call to your attention that the NRC had not given legally sufficient notice at the time of the operative events in the Saporito case (February 1992) that violations of 10 CFR § 50.7 could constitute a crime. Indeed, just one month prior to Mr. Saporito coming to the South Texas Project, the NRC explicitly recognized that it had not previously provided clear notice that criminal penalties might attach to violations of 10 CFR § 50.7. The notice of that proposed rulemaking stated:

> This rule will remedy several problems with the current method of providing notice of the criminal penalty provisions of the Act. It

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> may not always be readily apparent from a statement in the authority citations for each part that the purpose of that statement is to provide notice of potential criminal penalties for certain willful violations. . . . From time to time, errors have been made which hampered the effectiveness of including the criminal penalty notice provisions in the authorities sections. . . . Substantive regulations, such as 10 CFR 50.7 (a), which addresses discrimination against an employee for raising safety concerns, were overlooked. When § 50.7 (a) was originally issued, there was no specific notice in the authority section that this section was issued under 161b, 161i, or 161o. This oversight resulted in a failure to provide notice to the public that this substantive regulation was promulgated under the specific subsections for which the Act provides criminal penalties for willful violations. (emphasis added)

57 Fed. Reg. 222, 223 (January 3, 1992). As you know, a final rule was not issued until November, 1992.

Chairman Selin specifically conceded the flaws in prior attempts to "criminalize" violation of 10 CFR § 50.7 when he stated in his July 15, 1993 prepared testimony before the Senate Subcommittee on Clean Air and Nuclear Regulation:

> Another important change to the regulatory process was a recent rulemaking [the November 1992 amendments] which clarified that willful violations of the NRC employee protection regulations are subject to criminal sanctions. This should further serve to discourage licensees from engaging in discrimination -- not only will they face the potential for damages from DOL and civil penalties from NRC for discriminatory conduct, but prosecution by DOJ and criminal sanctions as well.

Prepared Statement at 7-8.

Both the November 1992 rulemaking and Chairman Selin's testimony are clear recognition by the NRC that there was no previous adequate notice that criminal penalties might attach to violations of 10 CFR § 50.7. The September 7, 1993 letter from Earl Silbert to William Sellers that was attached to my earlier letter explains in detail the defects in public notice and other legal flaws that would render any criminal prosecution under § 50.7 invalid.

As you mentioned in your letter, in 1990 the NRC added a numerical reference to Section 161i of the Atomic Energy Act to the listing of statutory authorities at the beginning of Part 50. However, as noted during the 1992 rulemaking, the addition of such a reference does not provide clear notice that criminal penalties may be imposed. This reference was included, without any explanation of its significance, in a lengthy string-cite containing dozens of other references. Furthermore, the actual text of the March 21, 1990 amendments and associated explanatory material, related to the prohibition of certain provisions in settlement agreements and provided no indication whatsoever that the amendments purported to criminalize any and all violations of the various other subsections of § 50.7. As detailed in Mr. Silbert's letter, this obscure and unexplained reference utterly failed to provide fair notice that a criminal prohibition was being established; also, for rulemaking purposes, it did not fairly apprise interested persons of the nature of the change to the regulations that was being undertaken.

You also mention in your November 23, 1993 letter that even prior to 1990, 10 CFR § 50.110 provided that willful violations of the requirements of Part 50 were subject to criminal sanctions. Prior to 1992, the relevant version of § 50.110 stated that intentional violations of regulations in Part 50 issued under the Atomic Energy Act may be subject to criminal sanctions "as provided by law." Section 223 of the Atomic Energy Act (the section that provides for criminal penalties) makes clear that the only NRC regulations for which criminal penalties are provided are those specifically issued under §§ 161b, 161i, or 161o of the Act. At the time it was promulgated, 10 CFR § 50.7 was not issued under any of those subsections. In fact, in the Federal Register Notice providing for implementation of 10 CFR § 50.7, that regulation was excluded from the listing of sections of Part 50 issued under §§ 161b, 161i, or 161o for purposes of § 223 (see 47 Fed. Reg. 30452, 30455, July 14, 1982) (copy enclosed).

Concerning withholding the attachments to my previous letter from public disclosure, although there has been some publicity regarding the Saporito matter, most of the details regarding the denial of his access to the South Texas Project have not been released to the public so far as I am aware, including information relating to Mr. Saporito's employment history. Also, as you noted, this matter is currently under review by the Department of Justice. Accordingly, to protect the privacy of both Mr. Saporito and the Houston Lighting & Power Company personnel involved, I continue to believe that it would be inappropriate to release documentation that would disclose these matters. Should you disagree, I am enclosing a redacted version of my November 9, 1993 letter and its attachments (and a redacted copy of this letter) which delete information that would identify specific individuals. Pursuant to 10 CFR § 2.790, I request that the unredacted materials either be withheld from public disclosure or returned to me. Please forward this letter, and its attachments, to the Department of Justice.

Irrespective of the Saporito matter, I would welcome the opportunity to meet with you or other members of the NRC staff to discuss the policy implications of criminalization of § 50.7 violations. Please call me should you wish to discuss these matters further.

Very truly yours,

Jay M. Gutierrez

Enclosures

cc: J. Taylor
T. Murley
B. Hayes
J. Goldberg
S. Black
E. Len Williamson