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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

April 12, 1995

Mr. Thomas J. Saporito
National Litigation Consultants
113 Lloyd Avenue
Pittsburgh, Pennsylvania 15218-1609

Dear Mr. Saporito:

This is in response to your March 22, 1995 facsimile, which forwarded an amended complaint that you have filed before the Department of Labor (DOL) concerning alleged discrimination against you in February 1992, by the Houston Lighting and Power Company (HL&P) and Newman & Holtzinger, P.C. Your amended complaint alleges that both HL&P and Newman & Holtzinger conspired to discriminate against you in causing your unescorted access to the South Texas Project Electric Generating Station to be revoked in retaliation for your engaging in protected activities, and that subsequent to the revocation of your site access, continued to discriminate against you by preventing you from obtaining employment at other nuclear facilities.

A note on the facsimile transmission cover sheet requested that the attached material, in this case the amended DOL complaint, be considered privileged and confidential and be exempt from public disclosure. Since the amended complaint is a public document, the NRC would be unable to honor this request. If the document were requested by a member of the public under the Freedom of Information Act, we would be obliged to release it to the requester.

In addition to the request to withhold your amended complaint from public disclosure, you have requested that the NRC consider the amended complaint a request for NRC action pursuant to 10 CFR 2.206 and 10 CFR 50.7.

After reviewing your request and the material you have submitted, the NRC has determined that you have provided no new facts or evidence to support your claim of discriminatory denial of site access. That issue was previously identified in your 10 CFR 2.206 petition received by the NRC on May 5, 1993. The NRC fully addressed that issue in Director's Decision 94-13, issued on December 20, 1994, and you have provided no additional information that would warrant further evaluation of that issue. Since the issuance of that Director's Decision, we have received responses to the Notice of Violation and Proposed Civil Penalty and the Demands for Information referred to in that Director's Decision. These are currently undergoing evaluation. The NRC staff further notes that with respect to your assertions concerning the alleged conspiracy and prevention of employment by HL&P and Newman & Holtzinger, your amended complaint also provides no information to support this allegation. Absent new facts, evidence, or information, there is no basis for the NRC to treat your amended complaint as a petition pursuant to 10 CFR 2.206. Accordingly, the staff denies your request for NRC action on the basis of your amended complaint; however, the staff will continue to monitor the current DOL proceedings that are considering this matter, and evaluate the results upon completion.

G/19

Thomas J. Saporito

In accordance with 10 CFR 2.790 of the NRC's "Rules and Practices", a copy of this letter will be placed in the NRC Public Document Room.

Sincerely,

Original Signed By
James Lieberman

James Lieberman
Director, Office of Enforcement

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EDO 0000216

not for J. Gray per attached previous correspondence sheet
WLO per S. Childs
Mark G. Jant

OE <i>not</i>	DD:JE <i>attached</i>	OGC <i>WLO</i>	D:OE <i>Childs</i>
MSatorius	JGray	JGoldberg	JLieberman
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FIBICH & GARTH, P.C.

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Handwritten notes and signatures, including "1", "2", "EP 93-43", and "File".

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5 TANNER GARTH

May 3, 1995

Mr. Ivan Sellin, Chairman
U.S. Nuclear Regulatory Commission
White Flint, Maryland 20555

Dear Sir:

I represent Messrs. Dave Lamb and James Dean in their claims against Houston Lighting and Power Company ("HL&P") numbered 93-ERA-7 and 93-ERA-8. I trust that by now you have had the opportunity to complete your review of the Recommended Decision and Order of Judge Miller. According to our conversation at the time of this writing, the Office of Enforcement has taken no action against HL&P in regards to this matter. In light of the Nuclear Regulatory Commission's ("NRC") historical mishandling of this matter, the OE's failure to promptly act was foreseeable. OE's failure to promptly issue maximum civil penalties and show cause orders is yet another demonstration of ineptitude and or impotence in the implimentation of the NRC's regulations.

The NRC's, and predominately Region 4's, mishandling of this matter dates back to 1989. According to the record, my clients reported to Don Driscoll several instances of regulatory non-compliance and the provision of material false statements by HL&P to the NRC. In reporting this information to Don Driscoll, my clients specifically requested that the matter not be turned over to Bruce Ernest of Region 4 for investigation. This was based upon the fact that Bruce Ernest had demonstrated an improper relationship with HL&P's NSD manager, William Randlett.

Despite my clients' request, the investigation was turned over to Ernest who appeared on site in April of 1989, and requested to review Safe Team reports 11881 and 11873.¹ Following his review of said reports Ernest appeared again on site in June of 1989 to "investigate" the concerns my clients had lodged with Don Driscoll in March. My clients were never provided any response, either written or verbal, to their formal written concerns lodged

¹ 11814 and 11873 reported regulatory violations including harassment and intimidation and retaliation by HL&P management.

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with Don Driscoll and the NRC in 1989. It should also be noted that concern 11881, which was reviewed by Bruce Ernest, documented the fact that harassment and intimidation was a reality at HL&P. Despite this evidence, Region 4 and the NRC took no action whatsoever to remedy the situation.

In March of 1991, my clients sent a letter to Joseph Tapia, the NRC resident inspector for the South Texas Nuclear Project. Once again, my clients were pointing out regulatory violations and the provision of material false statements to the NRC, as well as the ongoing improper relationship between Bruce Ernest and William Randlett. My clients were contacted by Region 4 investigators, Bill Beach and Linda McLean, to discuss the improper relationship. This led to an IG investigation on site at HL&P. According to the record in this matter, Robert Martin of the NRC contacted HL&P management and discussed the investigation and the names of the employee witnesses involved in the allegations. The impropriety of this pre-warning smacks of collusion and possibly even conspiracy. HL&P management pulled all of the witnesses named by the NRC into a room and interrogated them. The NRC then apparently approved HL&P imposing mandatory de-briefings upon all persons who discussed the situation with the NRC investigators. It is difficult to imagine a more intimidating circumstance than this. The NRC's approval of these de-briefings amount to NRC's sanctioned chilling effect over the free exchange of information among its licensees. The evidence at trial established that it was through these NRC approved mandatory de-briefings that HL&P management learned the identity of the alleged in this matter.

An investigation headed by Bill Tobin was also performed as a result of my clients' allegations registered with Mr. Tapia. That investigation resulted in the Tobin Report and three "violations". This report and these "violations" were handed down in November of 1991. At the time of trial in November of 1993, those violations, according to the evidence, were still the topic of ongoing negotiations and discussions between HL&P and the NRC. In November of 1991, John Montgomery, the Deputy Regional Administrator of NRC's Region 4, contacted HL&P management to discuss with him the improper relationship between Bill Randlett and Bruce Ernest. Bruce Ernest was apparently relieved from his inspection duties at the South Texas Project as a result thereof. However, no formal action was taken by the NRC.

In early 1992, HL&P unilaterally eliminated its NSD Compliance section which was created as a commitment to the NRC without any prior notice or approval by the NRC. No action was taken by Region 4 of the NRC on this somewhat unusual action. Shortly thereafter my clients were terminated along with Bill Worth, another whistle-blower. The NRC Resident Inspectors were apprised of this fact and my clients' allegations that the discharge was retaliatory. However, they took no action whatsoever. The chilling effect of such inaction cannot be over-looked or denied. It was only upon their complaint to the IG's office that an investigation was conducted by the NRC of the circumstances of my clients' removal. As I am sure you are aware, the NRC investigation found that, in fact, the terminations of Lamb, Dean and Worth were retaliatory and violative of their rights under the ERA. Incomprehensibly, in

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fact, incredibly, your Office of Enforcement took no action whatsoever upon this finding. The overall chilling effect of NRC's inaction in light of their own investigation finding retaliatory discharge, is immeasurable. Shortly thereafter, the Department of Labor investigator, Sammy Perez, confirmed the NRC's own finding, that the discharges had been in retaliation for protected activities. The NRC was copied on these findings and, again, incredibly, took no enforcement action whatsoever. The only logical explanations for this inaction are (1) complete and utter ineptitude or (2) complicity in HL&P's ongoing efforts to stifle its employees' willingness to report instances of regulatory violations and/or safety related concerns.

The NRC's ineptitude or complicity continued throughout and even after the trial of this matter before Judge Miller. Immediately prior to trial, HL&P, in an effort to insulate itself from responsibility for its actions with regard to my clients, conjured up an issue over alleged safeguards materials claimed to have been found in James Dean's abandoned apartment (it should be noted that James Dean was forced to abandon his apartment due to the financial ruin visited upon him by the wrongful discharge by HL&P). HL&P, by its method of presenting this matter to the Court, violated the very rules it claimed Jim Dean had violated. This was pointed out to the NRC by Dave Lamb. The NRC conveniently withheld any ruling or findings on these issues until after the trial was completed. Obviously any finding that the documents contained no safeguards information would have been beneficial to James Dean in the trial of this case. The belated finding contained in the report of the South Texas Project Allegations Review Team that there was no safeguards information contained in said materials was not received until 1995.² There are numerous erroneous details documented therein. First, the page marked "SAFEGUARDS INFORMATION" is stated by the NRC to have been redacted. That page contained no redacted information whatsoever. That page is, in fact, the very page ultimately relied upon by HL&P to excuse its termination of James Dean. The report goes on to falsely state that the NRC responded to the allegation previously on October 25, 1993. The allegers were never apprised in any way of this alleged finding. It is certain that no written response was ever made as same would certainly have been valuable in the trial.

During the trial of this cause and subsequent thereto, I was advised that the NRC had been monitoring the proceeding of this case and, in fact, received copies of the complete transcript. Based on that information, the NRC has had notice of incidents of witness intimidation by HL&P during the discovery phase of this case and during trial.³ No action whatsoever was taken upon HL&P for these acts of intimidation in 1993. This case has had a high profile on site. The NRC's failure to respond in any way to those occurrences of reported intimidation and harassment of witnesses has sent the clear message to those on site that the

² The Review Team finding on the allegations pertaining to the safeguards documents are found at 4.12.3 in the report of the STP ART.

³ See testimony of Gary Pomeroy.

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NRC will or can do nothing to stop these occurrences.

In May and June of 1994, the STP ART began gathering its information and material for its report. Items 4.12.1 through 4.12.6 apparently addressed allegations or concerns voiced by Messrs. Dean and Lamb to the review team. In light of the history set forth above, the review team's findings pertinent thereto are not particularly surprising but are, nevertheless, entirely incredible. 4.12.1.3 substantiates the allegation of improper reporting to the NRC but recommends no action. The Review Team failed to address the fact that STP management once again provided a material false statement to the NRC. Likewise with 4.12.3.2 the Review Team substantiated my clients' allegations, while once again ignoring the substance thereof. It is utterly incredible that the Review Team took the position that it was unable to determine the safeguard's significance of the physical security plan, which was the subject of that issue. It is furthermore, incredible that the Review Team failed to address STP Management, once again providing the NRC with material false statements as to the location of this incident and the physical surroundings thereof. Once again, it appears that the NRC was merely trying to paper an allegation and assist HL&P in covering up its own wrongdoings.

Likewise, in 4.12.5 the Review Team substantiated the fact that STP management had failed to properly report the discovery of a weapon in a protected area. The Review Team's incredible assertion that a gun in the protected area is of "low safety significance" is truly beyond comprehension. It is clear that once again the Review Team's purpose was not to critically evaluate and enforce compliance with its regulations, but to pay lip service to evaluating allegations and protect itself and HL&P by creating paper answers with no solutions. The very language of the report supports this conclusion. On each of the substantiated concerns the Review Team states that the instances "may" be a violation of NRC regulations. The fact of the matter is that each and every one of them is a violation of NRC regulations and none of them have been cited or properly acted upon.

It is generally accepted in the nuclear industry that the most likely cause of any nuclear "accident" in this country will be the result of sabotage and/or terrorism. The recent events in New York City and Oklahoma City should serve adequate warning as to the absolute necessity and incredible safety significance of security programs in this country's nuclear facilities. Given the NRC's mishandling of the South Texas Project's nuclear security department, and concerns raised pertinent thereto as set forth above, numerous questions should be posed and must be answered by the NRC.

- 1) What enforcement action has been, or will be, taken by the NRC as a result of the recommended decision and order of Judge Miller? The STP allegations review team at 3.4 of its report documents the history of the fact that the NRC Office of Inspector General previously found retaliation yet no enforcement action

was taken.⁴ The Review Team indicates that the Office of Enforcement will monitor the DOL process and take appropriate enforcement action upon issuance of the decision by the DOL ALJ. To date, no such action has been taken. It is difficult to imagine a more forceful opinion based upon all of the evidence adduced at a lengthy trial. According to the Administrative Law Judge, upper management at South Texas Nuclear Project, as well as its attorneys, were involved in the harassment, intimidation and termination of whistle-blowers at the South Texas Nuclear Project and the fostering of the chilled atmosphere stifling the free exchange of information among employees. What enforcement action will be taken and when will it be taken?

- 2) Judge Miller's recommended order at number 1 requires HL&P to take affirmative and appropriate action forthwith to abate all discriminatory actions against personnel who engage in protected activity as defined under the ERA. What steps has the NRC taken to ensure that this order is complied with? To date, no offer of settlement has been extended by HL&P despite a very reasonable demand being placed by Messrs. Lamb and Dean. It should also be noted that, Messrs. Balcolm, Moore, Hinson, Jordan and Sheesly, each of whom were shown to have been involved in the harassment and intimidation of my clients and others, are still employed in upper management positions at STNP.
- 3) I have recently discovered that Bruce Ernest has been reinstated to his position of over-sight for STNP. How could this be possible?
- 4) Chairman Ivan Sellin stated publicly that the NRC would not withhold its rulings in whistle-blower cases pending rulings by Administrative Law Judges. Despite that unequivocal statement, no action was taken in this case, and in fact, still has not been taken. Why not?
- 5) What steps have been taken to address HL&P's harassment and intimidation of witnesses who came forward to testify in the trial of this cause?
- 6) What steps have been taken to prevent HL&P attorneys from harassing and intimidating witnesses in this, and other cases such as this?
- 7) Why did Don Driscoll turn my clients' allegations over to Bruce Ernest for investigation despite my clients' express request that he not be involved?

⁴ It is interesting to note that a demand for information was apparently issued to the licensee and one individual, yet these "demands" for information were not provided in response to numerous FOIA requests by the undersigned.

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- 8) Why were my clients never provided any response to their formal written concerns lodged with the NRC in 1989?
- 9) Why did the NRC fail to take any action on the finding and Speak Out Concern 11881 that a chilling effect existed in the Nuclear Security Department?
- 10) Why did Robert Martin provide HL&P management the names of witnesses involved in the allegations in 1991?
- 11) Why did the NRC approve HL&P imposition of mandatory de-briefings upon all persons who discussed allegations with the NRC investigators?
- 12) What was the final resolution of the three "violations" handed down by the NRC in Inspection Report 91-21? If there has been no final resolution, why not?
- 13) Why did John Montgomery contact HL&P's management to discuss the improper relationship between Bill Randlett and Bruce Ernest? What actions were taken against HL&P as a result of its part in the relationship?
- 14) Why was Dave Lamb not provided with a written response to his allegations pertaining to the safe-guards incident until 1995?
- 15) Please explain how finding a gun in the protected area at a nuclear facility such as the South Texas Nuclear Project can be considered of low safety significance. Why was this "finding" of the ART accepted and published by the NRC?
- 16) Why was the Review Team unable to determine the safe-guard significance of the South Texas Nuclear Project's then current Physical Security Plan? (Item 4.12.3.2)
- 17) Most of the recommended inaction of the STP ART were justified with the phrase: "improved licensee performance in the safe-guards area". This justification begs a question as to whether there is any real improvement or it is just a lack of reporting due to the fact that HL&P has eliminated whistle blowers and that a pervasive chilling effect exists in the South Texas Nuclear Project's Security Department. This false picture of improvement would certainly seem to be furthered by Region 4's reinstatement of Mr. Ernest in an oversight position at the South Texas Project.

An independent report stated in July of 1993, in pertinent part:

The general perception among security officers is that "management" is unresponsive to their concerns. "Management" includes non-uniformed personnel employed by HL&P and TWC. Interviews of security officers indicate that most believe that it is unproductive to express concerns to management. They use examples of concerns expressed about excessive over-time, cancelled vacations, favoritism, swapping of shifts, inconsistent discipline and procedures and poor maintenance of security systems. In addition they believe that they will be viewed as disloyal to their company and that they may subject themselves to reprisals from management if they express concerns.

Other than the elimination of the compliance section and the wrongful termination of Messrs. Lamb, Dean and Worth, and the re-instatement of Mr. Ernest, what has changed to lead the Review Team to the conclusion that the violations it found need not be cited due to "improved licensee performance"?

- 18) The independent report found that "the amount of over-time hours that officers are required to work is excessive." This is in direct contradiction to findings set forth in NRC inspection reports. Why?
- 20) Finally, the report states the following:

Overall moral is bad. This is generally attributed to: excessive over-time, inconsistent policies and practices, harsh discipline, cancelled days off and vacations, favoritism, swapping of shift schedules, lack of recognition for good and performance, and poor management . . . Management preaches an open door policy but in practice views and treats those who express concerns as disloyal.

Again, what has changed since this independent report and that of the Review Team and who told the Review Team that things have changed?

Your prompt provision of direct and succinct answers to these questions would be greatly appreciated and would seem to be quite appropriate.

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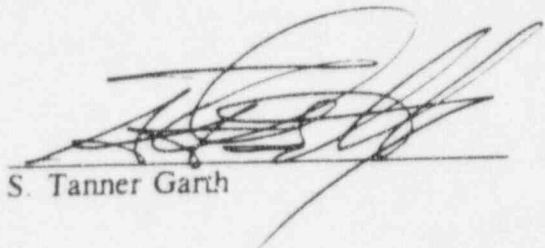
The old axiom, justice delayed is justice denied is perfectly illustrated by this long running case. It has now been three years since my clients were wrongfully terminated by management at the South Texas Nuclear Project. Each has been subjected to utter financial ruin. Dave Lamb was forced into bankruptcy and Jim Dean could not even afford to file bankruptcy. This, while the NRC sat by and did nothing despite its own investigation and finding that the terminations had been improper. To date, despite assurances to the contrary, no effort to settle this case has been made by HL&P. It appears clear to me that it is time for the NRC to get involved and rectify this wrong.

If you have any questions or comments, please feel free to contact me.

Very truly yours,

FIBICH & GARTH, P.C.

By:


S. Tanner Garth

STG/sr