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

February 14, 1997

EA 95-077
EA 96-133
EA 96-136

William T. Cottle, Group Vice
President, Nuclear
Houston Lighting & Power Company
P.O. Box 289
Wadsworth, Texas 77483

SUBJECT: HL&P RESPONSES TO PROPOSED CIVIL PENALTIES

Dear Mr. Cottle:

This is in response to Houston Lighting & Power Company's (HL&P) October 21, 1996 and November 11, 1996 replies to civil penalties proposed by the NRC for violations of 10 CFR 50.7, a regulation which prohibits discrimination against individuals who engage in certain protected activities.

HL&P's October 21, 1996 letter responded to a Notice of Violation and Proposed Imposition of Civil Penalties ($200,000) issued by the NRC on September 19, 1996 (EA 96-133 and EA 96-136). The enforcement action was based on the determination that two former contract employees at HL&P's South Texas Project had been discriminated against as a result of engaging in protected activities. HL&P paid the proposed civil penalty but requested reconsideration of the amount. In Enclosure 1 to this letter, the NRC has addressed HL&P's arguments for reconsideration.

HL&P's November 11, 1996 letter provided a deferred response to a Notice of Violation and Proposed Imposition of Civil Penalties ($160,000) issued by the NRC on October 17, 1995 (EA 95-077). This enforcement action was based on the determination that two former members of the STP security staff had been discriminated against as a result of engaging in protected activities. HL&P's response was submitted following the Department of Labor's October 10, 1996 approval of a settlement agreement between HL&P and the two former employees. HL&P paid the proposed civil penalty but requested reconsideration. In Enclosure 2 to this letter, the NRC has addressed HL&P's arguments for reconsideration.

As discussed in more detail in the enclosures, the NRC does not believe that HL&P has provided a sufficient basis for mitigating the penalties. Despite HL&P's extensive efforts to develop and maintain an environment at STP in which employees feel free to raise concerns about safety or compliance, the NRC continues to believe that the violations occurred and that violations of this regulation demand strong enforcement action. The NRC does acknowledge, however, that these violations, the most recent of which occurred in early 1994, are not reflective of HL&P's more recent focus on and commitment to its employee concerns program at STP. We assume, based on your efforts in this

IE14

area, that you understand that discrimination by supervisors and contractors is not acceptable; the NRC's expectation is that the penalties in these cases will serve to remind HL&P and its employees that these efforts must be continuous and lasting. The NRC acknowledges HL&P's payment of the proposed civil penalties and will continue to monitor the effectiveness of HL&P's efforts in this area.

In accordance with 10 CFR 2.790 of the NRC's "Rules of Practice," a copy of this letter and its enclosures will be placed in the NRC Public Document Room (PDR).

Sincerely,

James Lieberman, Director
Office of Enforcement

Docket Nos. 50-498; 50-499
License Nos. NPF-76; NPF-80

Enclosures: As stated

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Enclosure 1 -- EA 96-133 and EA 96-136

On September 19, 1996 a Notice of Violation and Proposed Imposition of Civil Penalties (Notice) was issued for two violations of 10 CFR 50.7. Civil penalties of $100,000 were proposed for each violation. The violations were based on the NRC's review of a March 13, 1996 Secretary of Labor's Decision and Order of Remand in the case of Thomas H. Smith (93-ERA-016) and a September 29, 1995 DOL Administrative Law Judge's Recommended Decision and Order in the case of Earl V. Keene (95-ERA-004). Houston Lighting & Power Company (HL&P) responded to the Notice on October 21, 1996. HL&P paid the proposed civil penalties, but requested reconsideration. The NRC's evaluation of the licensee's arguments appears below.

1. HL&P stated that it did not believe there was substantial evidence that Mr. Smith was subjected to a hostile work environment or that Mr. Keene was subjected to retaliation as a result of engaging in protected activities.

   The NRC based its enforcement actions on the Department of Labor's findings and in the absence of compelling evidence to the contrary, the NRC accepts the DOL findings as a basis for its enforcement actions and does not intend to reconsider the violations.

2. HL&P argued that Violation 1 should be classified at Severity Level III because only first-line supervisors, i.e., foremen and general foremen, were involved.

   The NRC based the severity level of this violation on the conclusion in the Secretary of Labor's (SOL) decision that Mr. Smith was subjected to a hostile work environment, which equates to a Severity Level II violation in the NRC's Enforcement Policy (Supplement VII, Example B.9). The SOL's decision found that managers at various levels were aware of the cartoons and that no action was taken to stop this behavior for more than 2½ months. The SOL's decision stated "Although the offices of the higher managers were located elsewhere ... many employees, undoubtedly the higher managers included, used or came through the lunchroom to buy sodas and candy bars ... In sum, I conclude that Smith's foremen and managers were aware of the cartoons and were aware of Smith's reputation or history as an NRC whistleblower."

3. HL&P requested reconsideration of the NRC's conclusion that Violation 1 was willful and the effect of this conclusion on the civil penalty assessment process. HL&P noted that none of the testimony in the Department of Labor's hearing showed that the persons who created the cartoons recognized that the cartoons were offensive and might be viewed as adverse employment action or might discourage reporting of safety concerns.

   The NRC assumed, based on its review of the SOL's decision, that the intent of the cartoonists and the cartoons was to ridicule Mr. Smith because he was known or suspected to have brought issues to the attention of HL&P and the NRC. The NRC does not see how those who were involved in this activity could not have intended this to have an effect on Mr. Smith himself and his willingness to bring issues forward. The

NRC considers such behavior willful. Even if this violation were not considered willful, it would have no effect on the civil penalty assessment process because it would not alter the severity level or the manner in which the NRC considered *identification* and *corrective action*.

4. HL&P took issue with the NRC's consideration of the *corrective action* factor, specifically with NRC's conclusion that corrective action credit was not warranted because corrective actions were not timely with respect to the individuals who were responsible for the violations. HL&P's arguments were based on the timing of the DOL findings of discrimination and the ability of HL&P or its contractor to locate or determine whom the responsible individuals were. HL&P argued, essentially, that appropriate actions were taken from the time it was determined by the DOL that discrimination had occurred.

   Perhaps the NRC's point on this issue was not made sufficiently clear. The NRC stated in its letter that the fundamental step of counseling the involved supervisors should have been taken much earlier. In cases involving discrimination, it is the NRC's view that corrective action should begin at the time it is alleged that discrimination has occurred. This is particularly true in the case involving Mr. Smith, where HL&P and its contractor agreed that the behavior involved was objectionable. Thus, it is the NRC's view that the HL&P and its contractor should have attempted to find and counsel the involved individuals -- or the employee group in which they resided -- when you became aware of the alleged violations, and not wait until there was a legal finding that a violation occurred. The NRC considers prompt action of this type necessary to address the potential for a chilling effect on the willingness of others to bring concerns forward.

5. HL&P argued that the NRC failed to give HL&P adequate credit for its extensive corrective actions in this area. HL&P stated that is unclear how the NRC can conclude that a civil penalty is needed as a deterrent to noncompliance or to encourage corrective action.

   As HL&P noted, the NRC has recognized HL&P's extensive corrective actions aimed at developing and maintaining an environment at STP in which employees feel free to raise safety or compliance concerns. As indicated in the enforcement action, the proposed civil penalty in the case involving Mr. Smith was less than it could have been for a Severity Level II violation of this nature. Notwithstanding HL&P's efforts at STP, the NRC believes that violations of this requirement warrant strong enforcement action unless the circumstances of the case match those described in Section VII.B.5 of the Enforcement Policy. The NRC also notes that the deterrent effect of enforcement actions is not limited to the licensee against whom the enforcement action is being taken.

Enclosure 2

On October 17, 1995, a Notice of Violation and Proposed Imposition of Civil Penalties (Notice) was issued for two violations of 10 CFR 50.7. Civil penalties of $80,000 were proposed for each violation. The violations were based on the NRC's review of an April 6, 1995 DOL Administrative Law Judge's Recommended Decision and Order in the case of David Lamb and James Dean (93-ERA-007 and 93-ERA-008), and on an investigation conducted by the NRC Office of Inspector General (OIG). A settlement of the individuals' complaints filed with the Department of Labor (DOL) was approved by the DOL's Administrative Review Board on October 10, 1996. Houston Lighting & Power Company (HL&P) submitted a deferred response to the Notice on November 11, 1996. HL&P paid the proposed civil penalties, but requested reconsideration. The NRC's evaluation of the licensee's arguments appears below.

1. HL&P stated that it did not believe that a violation occurred. HL&P cited its November 15, 1993 response to a Demand for Information and the record of a June 16, 1995 predecisional enforcement conference as its basis.

   The NRC considered HL&P's arguments prior to issuing the enforcement action in October 1995. Since HL&P has provided no new information to support its position, there is no reason for the NRC to reconsider its position on whether the violations occurred.

2. HL&P protested the civil penalties based on its extensive corrective actions. HL&P cited prompt, comprehensive and effective corrective action to address the overall work environment for raising safety concerns and the settlement of the complaint to the satisfaction of the involved employees.

   As discussed in the October 17, 1995 enforcement action, the NRC recognized HL&P's corrective actions and in fact cited this as a basis for not increasing the civil penalties above the base value of $80,000 for a Severity Level II violation. As discussed in Enclosure 1, the NRC believes that violations of this requirement warrant strong enforcement action unless the circumstances of the case match those described in Section VII.B.5 of the Enforcement Policy. The NRC does not believe that the circumstances of this case match those described in VII.B.5. Although a settlement agreement was reached with the former employees, it occurred long after the Administrative Law Judge issued his Recommended Decision and Order and even longer after the hearing itself was conducted. The emphasis in the Enforcement Policy is on settling such complaints before an evidentiary hearing.

3. HL&P stated that although the decision to terminate the employees was made by the manager of the Nuclear Security Department, who was above first-line supervisory level, that there was no probative evidence that this manager knew the employees had engaged in protected activity. HL&P stated, therefore, that the violation was not attributable to a manager above first-line supervision and cited its removal of the involved manager from nuclear duties in 1993 despite its belief that no violation occurred.

The DOL Administrative Law Judge's (ALJ) recommended decision and order in this case, which the NRC relied upon in making its enforcement decision, cited widespread knowledge or suspicion among various managers at STP, all above the level of first-line supervisor, that these employees were reporting issues to the NRC. Furthermore, there was no evidence introduced to suggest that anyone at or below the first-line supervisory level was involved in the decision to terminate Mr. Lamb and Mr. Dean or was motivated to terminate them as a result of their engaging in protected activity. In addition, the ALJ found "incredible" the Nuclear Security Department manager's categorical denial that he had some knowledge of Mr. Lamb's and Mr. Dean's involvement with the NRC. The NRC has relied upon the ALJ's findings in making its enforcement decision and, absent compelling evidence to the contrary, does not intend to relitigate this matter. In its simplest terms, the NRC believes that a violation occurred, and the former manager of the Nuclear Security Department took sole responsibility for making the decision to terminate Mr. Lamb and Mr. Dean at the predecisional enforcement conference conducted on June 16, 1995. Therefore, the NRC concludes that the violation was in fact caused by management above the first-line supervisory level.

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