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August 17, 2001

Mr. Barry C. Westreich
Senior Enforcement Specialist, Office of Enforcement
U.S. Nuclear Regulatory Commission
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Re: Comments on Discrimination Task Group Draft Report

Dear Mr. Westreich:

Morgan Lewis hereby submits comments on the Nuclear Regulatory Commission's (NRC) Discrimination Task Group Draft Report on behalf of Southern California Edison, TXU Electric, STP Nuclear Operating Company, Nuclear Management Company, Wolf Creek Nuclear Operating Company, AmerenUE, and PPL.

We believe that the recommendations in the Draft Report fail to correct and, in many cases, exacerbate existing deficiencies in the current NRC process for administration of 10 C.F.R.§50.7. Accordingly, and for the reasons set forth in greater detail below, these recommendations should be reconsidered and/or rejected.

Our comments are offered in the context of the nuclear industry's extraordinary performance record, which demonstrates steady, significant improvement in all indicators of plant safety, reliability and regulatory performance over the past decade. This, in major part, has stimulated important reforms in NRC oversight, inspection and enforcement processes, aimed at sharpening the agency's focus on safety and risk, and optimizing utilization of resources. The Task Group recommendations are inconsistent with, and depart from, the

positive direction of the Commission's regulatory reforms and are completely at odds with the industry performance record which motivated these reforms. If accepted, the Task Group's recommendations will result in a process that is even less timely, more legalistic, adversarial, punitive and costly.

The Task Group's recommendations are likely to impede the ability of industry managers to manage employee performance and ensure accountability. Contrary to the statutory test enunciated by Congress, the current NRC staff interpretation credits the slightest shred of evidence to find a retaliatory motive on the part of license supervisors and managers, in effect creating a presumption of guilt. As a result, responsible managers who are willing to hold employees accountable for performance are subjected to second-guessing, and the value of their critical performance assessment is diminished.

With a single phone call, an employee who objects to disciplinary action or criticism of his/her performance can trigger an NRC Office of Investigations (OI) investigation. This process and any resulting enforcement initiative can, and in many cases, has taken months or years to complete. In the meantime, the supervisor's career is on hold and his/her fellow supervisor and managers inevitably receive a long-lasting message: management of employee performance must be approached with utmost caution and otherwise obvious performance decisions, if made at all, must be preceded by multiple layers of management, human resources, and legal review. NRC's process for administration of 10 C.F.R. §50.7 thus creates additional unnecessary barriers for supervisors in managing employee performance. If adopted, the Task Group's recommendations will increase these barriers.

Our specific comments on the Task Group's recommendations proceed from three basic principles:

A. The NRC's interpretation of the legal standard governing 10 C.F.R. § 50.7 enforcement must comply with the standard enacted by the Congress.

B. The NRC process for enforcement of 10 C.F.R. §50.7 must afford fundamental fairness to licensees, managers and supervisors, and employees alike.

C. The NRC process for administration of 10 C.F.R. §50.7 must assure that the NRC can meet its regulatory obligations, while maintaining an effective, efficient and focused application of finite safety resources.

At least eight of the Task Group's recommendations fail to meet these principles and must be rejected.

A. The NRC Staff's Interpretation of the Legal Standard Governing § 50.7 Enforcement Conflicts with the Standard Enacted by Congress

The NRC Staff has developed an interpretation of Section 211 of the Energy Reorganization Act which holds that: if there is any evidence, circumstantial or otherwise, of a discriminatory motive—even if the weight of the evidence suggests that an employer was motivated by legitimate business reasons—the NRC will nevertheless find a violation of §50.7. In contrast, Congress has expressly directed in Section 211 that legitimate business reasons can and must be considered and credited where an employer can make a clear and convincing demonstration of legitimate business reasons for an employment action. See 42 U.S.C. § 5851(b)(3)(B); 10 C.F.R. § 50.7(d). The DOL, which is the agency with primary expertise and jurisdiction over discrimination matters, follows this statutory test. The Task Group has not provided a convincing explanation of the basis for the NRC's departure from the statutory standard.[1] We believe that the NRC Staff interpretation, which was adopted without any public airing, debate, explanation, or consideration by the Commission itself violates the letter and spirit of the statute. Consequently, the Staff's interpretation will not withstand judicial scrutiny under the Supreme Court's recent decision in United States v. Mead Corp., 121 S. Ct. 2164 (2001).

B. The Task Group's Enforcement Recommendations are Fundamentally Unfair

1. Licensees and Individuals Should Receive OI Reports and A Full Explanation of NRC's Basis for Enforcement In Advance of the Pre-Decisional Enforcement Conference

We agree with the Task Group's recommendation to provide licensees and individuals with the OI report in advance of the pre-decisional enforcement conference. This recommendation, however, does not go far enough.[2] Before setting the pre-decisional enforcement conference, the NRC should present a reasoned basis for its preliminary conclusion that a preponderance of the evidence, as the agency understands the facts, would support a finding of discrimination. The NRC's preliminary evaluation should be comparable in form and content to the manner in

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1 The Task Group Report claims that the standard applied by the NRC is similar to that applied by DOL. Task Group Report at 18-19. The NRC standard, however, which ignores legitimate business reasons for adverse employment actions if protected activity played any part in the employment decision (the so-called "in-part" test) reads Section 211(b)(3)B completely out of the statute.

2 Unless the Task Group's recommendation to resequence the enforcement conference is rejected, any benefit derived from increased NRC disclosure will be, at best, minimal. See comment B.2 below.

which an ALJ weighs all the evidence presented in preparing a Recommended Decision and Order under §211. With the OI record, all related documents, and a full NRC explanation as part of its notice, a licensee or individual manager can identify any disputed facts or conclusions before the conference, have a meaningful opportunity to address the NRC's concerns, and assure that the NRC gains a complete understanding of the relevant facts.

In connection with non-§50.7 issues, the NRC provides licensees with complete information, including inspection report findings, prior to an enforcement conference. See NRC Enforcement Manual, Section 5.2.2. NRC has followed this practice uniformly, providing full disclosure to licensees and a complete record for decision. Because the consequences of an adverse §50.7 decision are so severe for licensees and managers, the NRC's failure to provide full disclosure in §50.7 cases is grossly unfair. At a minimum, fundamental fairness requires that responsible licensees, managers and supervisors know the entire basis for any charges against them and are provided with a meaningful opportunity to respond.

2. The Current Sequencing of Enforcement Conferences Should be Retained

The Task Group recommends reversing the sequence of the current enforcement process so that individuals and licensees would not have an opportunity for an enforcement conference until after the enforcement action is proposed by the NRC Staff. This recommendation deprives individuals and licensees of a vital opportunity to address NRC concerns early in the process, while at the same time impeding the NRC's ability to develop a complete understanding of the facts before it makes an initial decision on enforcement action.

Staff issuance of a proposed enforcement action before the enforcement conference immediately places the careers of affected licensee personnel on hold. More importantly, however, premature decisions may entrench the Staff and make it difficult to reverse an incorrect Staff decision. Regardless of how the Commission acts on the Task Group's recommendations, if the Staff follows current practice and issues a press release along with the proposed action, irreparable damage to the reputation of the company and affected individuals can occur before the company or individual has had any meaningful opportunity to respond. The Task Group's resequencing recommendation should be rejected.

3. 10 C.F.R. Part 2 Should Be Revised to Provide A Right To a Hearing For Individuals Issued a Notice of Violation

In their current form, the NRC's regulations provide no opportunity for a hearing on a Notice of Violation (NOV). When an NOV is issued to an individual, it stigmatizes the individual and damages his career. It is unthinkable that, in these NRC circumstances, the NRC would deny an individual at least one opportunity to respond to all the charges against him or her before a neutral trier of facts.

The Task Group report dismisses the many comments in support of providing such hearing rights, because "the NRC's action of issuing a violation does not itself have any implications to the individual's career," and because of "resource considerations" involved in granting hearing requests.[3] In reaching this conclusion, the Task Group ignores the compelling testimony presented by counsel for industry managers during the September 5, 2000 public meeting with the Task Group at NRC headquarters. This testimony described the real, long-lasting and detrimental career effects that have been caused by individual notices of violation, including lost opportunities for promotion and new employment. See Meeting Summary for September 6, 2001 Discrimination Task Group Meeting in NRC Headquarters, Rockville, MD, Attachment 2.

While the Staff opposes granting a hearing right because of cost considerations, no mention is made of the need to consider the basic rights of accused individuals. An NOV is a powerful tool that NRC can and will use to punish those who discriminate and to correct a degraded SCWE. The power of this tool dictates that it be applied sparingly and with absolute fairness. If NRC devotes significant resources to investigations and enforcement action in anticipation of an individual NOV, fundamental fairness requires that it apply the modest increment of resources necessary to assure that the NOV is properly resolved and the rights of individuals are protected.

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[3] The Task Group indicated that it would not propose a change now since this issue was the subject of an ongoing rulemaking. Task Group Report at 17. Since the publication of the Task Group report, the rulemaking petition regarding individual hearing rights has been withdrawn. 66 Fed. Reg. 29761 (June 1, 2001).

C. NRC Can Meet its Regulatory Obligations While Maintaining an Effective, Efficient and Focused Application of Safety Resources.

1. The Threshold for Investigating Individual Discrimination Allegations Should be Raised Rather Than Eliminated

Despite the Commission's specific direction to better focus agency resources on high priority discrimination cases and defer the remainder to the DOL process, (SRM 97-147), the Task Group recommends ceasing the practice of deferring any case to the DOL process.[4] We believe this regressive policy change is ill-advised.

Significantly, the Task Group indicates that the other safety-related agencies, whose processes it reviewed, routinely refer individuals alleging discrimination to OSHA and do not conduct any independent inspection, investigation, or enforcement activities. The Task Group does not, and evidently cannot, explain why it believes the NRC should be different.

The Task Group's data suggest that fewer, not more, investigations are warranted. The Task Group's draft report shows that the four- or five-fold increase in investigations from 1994 to 1998 did not result in a proportionate increase in the number of substantiated cases (*See* Figure 1, page 7 of the draft report). The bar graph depiction for 1998 suggests that nearly every allegation was investigated with no corresponding increase in the number of substantiated cases.

We believe that the NRC, especially in light of licensee improvements in SCWE, should have a heightened threshold for OI to investigate individual discrimination

[4] The Commission's direction, now contained in Management Directive 8.8, instructs the NRC Staff to defer investigating discrimination allegations and await the results of the DOL investigation unless: (1) the allegation involves wrongdoing; (2) there has been a finding of discrimination against the licensee by DOL or NRC within the past 24 months; (3) the alleged discrimination is particularly egregious; or (4) there is evidence of a deteriorating safety-conscious work environment (SCWE). In practice, however, these exemptions swallow the rule, resulting in NRC almost always referring allegations to OI for investigation rather than waiting for or relying on the DOL process.

allegations, such that an investigation would be the rare exception, and not the rule.[5] Rather than performing its own investigation, the NRC should normally defer to the DOL. If an individual has not gone to DOL, or for whatever reason, has decided not to pursue his or her claim before DOL, NRC should not itself pursue the very same claim, but rather, close out the discrimination aspect of the allegation after addressing programmatic issues and chilling effect. NRC can thus fulfill its regulatory obligations, while assuming the most effective, efficient and focused application of safety resources.

2. Discrimination Allegations Should be Referred to Licensees

The Task Group recognizes that, in limited circumstances, discrimination allegations should be referred to licensees for resolution. We believe referral should be the norm.

In virtually all cases in which the allegation, if true, would constitute discrimination, NRC should refer the allegation to the licensee and request that the licensee address: (1) the alleged discrimination; and (2) actions taken to address any potential chilling effect resulting from the specific allegation. This change would ensure that the NRC has a more complete and balanced understanding of the facts and circumstances surrounding the alleged discrimination before it makes any decision to investigate or defer to the DOL process. It also would ensure, very early in the process, that a licensee has taken prompt and adequate action to address any potential chilling effects.

The Task Group is wrong in concluding that such referrals would have a chilling effect and a negative impact on public confidence. To the contrary, timely and effective handling of allegations by licensee management will promote an improved SCWE and enhance public confidence.

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[5] As recognized in our earlier comments, special circumstances may warrant a separate NRC investigation. These special circumstances, however, should be the rare exceptions. Factors NRC might consider in determining whether OI should investigate individual discriminations allegations are: (1) the licensee's record of substantiated discrimination allegations (e.g., three or more in the prior two-year period); (2) the record within the particular work group involved in the current allegation (*e.g.*, a substantiated discrimination allegation within the past year); or (3) after reviewing the licensee response and corrective actions, the NRC's

The NRC has had success in routinely referring technical allegations to licenses for resolution. The NRC has recognized that licensee Employee Concerns Program have been increasingly effective in resolving both technical and internally raised discrimination issues, and in helping to maintain a SCWE. If ECPs and allegation referrals are effective in resolving technical issues, internally raised discrimination issues, and SCWE issues, then these mechanisms can be equally effective for referred discrimination issues.

Implicit in the Task Group's recommendation to reject referrals to licensees is the assumption that the threat of NRC enforcement action is necessary in order for management to do its job in assuring safety and reliability—in this case, managing and resolving discrimination allegations fairly and in good faith. These are the same managers who have led the industry to new heights in performance and safety over the past decade, while improving a SCWE. These achievements are the result of the work of dedicated management. Their record demonstrates that licensee management can and should be entrusted with the investigation and resolution of discrimination allegations.

3. The NRC Should Extend Credit for Settlement of Discrimination Claims

The Task Group recommends, without any cogent explanation, that the NRC should continue investigation of any discrimination claim that has resulted in a settlement between the alleger and the employer. We believe that this is an important policy issue than cannot be so blithely dismissed. Early resolution of discrimination claims has important positive effects on the work environment. Most discrimination claims involve a near total breakdown of the relationship between the employer and employee. Settlements and other forms of Alternative Dispute Resolution are demonstrably effective in breaking cycles of contentious interaction and in resolving intractable personnel issues promptly and fairly. The Task Group recommendation ignores this reality of the workplace and removes an important incentive for both complainants and licensee management to pursue settlement.

Longstanding NRC policy has favored settlement of disputes (See 10 C.F.R. 2.759; NRC Enforcement Policy, Section VII.B.5.) and federal policy encourages agencies to avoid litigation in favor of more expedient and efficient mechanisms for dispute

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determination as to whether the case remains so egregious that it compromises the overall SCWE at the site.

resolution. See Executive Order 12988-Civil Justice Reform, 61 Fed. Reg. 4729 (Feb. 7, 1996). The Task Group Report is inconsistent with these policies insofar as it recommends, without explanation, that the Enforcement Policy be revised to eliminate any credit for licensee settlements. This recommendation can only encourage litigation, which is costly to licensees, complainants, and the NRC, with no offsetting safety benefit.

4. There Remains No Need to Adopt a Safety Conscious Work Environment Rule

We agree with the Task Group that development of a SWCE rule is not warranted. The NRC already has considered such a policy and concluded that existing policies, requirements and regulatory options available to the NRC are sufficient to meet expectations in this area, and that new requirements and policies are unnecessary. See Withdrawal of Safety Conscious Work Environment Proposal, 63 Fed.Reg. 6235 (Feb. 6, 1998). Since that time, licensee attention to SCWE-related issues has increased. This further validates the NRC's decision that such a rule is not needed. Indeed, the Task Group recognizes the nuclear industry as "one of the more proactive industries with regard to soliciting concerns and feedback from the workforce."

We are concerned, however, that the Task Group appears to believe that if it follows industry's recommendation that the NRC focus on the safety significance of SCWE issues, the NRC will somehow be unable to assess the potential impact of individual discrimination claims without developing a SCWE rule and corresponding tools to assess SCWE. Task Group Report at 53. This apparent belief is simply incorrect. Individual discrimination claims do not necessarily evidence a deteriorating or problematic SCWE. Moreover, the NRC already has at its disposal, and has frequently exercised, numerous regulatory devices to evaluate a licensee's SCWE. These include chilling effects letters, the inspection program (specifically IP 71152 – "Identification and Resolution of Problems"), licensee or third-party SCWE assessments, allegations data, licensee responses to referred allegations, and the record developed by DOL in individual cases. Of course, reactor licensees are required to maintain an effective system for identifying and correcting safety issues under 10 C.F.R. Part 50, Appendix B. The NRC can continue to meet its regulatory responsibilities without a SCWE rule.

In closing, we would emphasize that the NRC has an important opportunity to improve its process for handling discrimination allegations, such that all stakeholders—industry management, employees and the public—gain confidence that NRC decisions will be made in accordance with the governing statute, with fairness to all stakeholders and in fulfillment of all NRC regulatory obligations, while still maintaining an effective, efficient and focused application of safety resources. The Tasks Group's recommendations fail to meet those principles, and for the reasons stated above, should be rejected. Please contact me at (202) 467-7459, or Jay Gutierrez at (202) 467-7466, if you have any questions concerning the foregoing.

Sincerely,

George L. Edgar

cc: Chairman Meserve
Commissioner Dicus
Commissioner McGaffigan
Commissioner Merrifield