

REDACTED

March 19, 2000

Director, Office of Enforcement
C/O NRC Region III Office of Allegations
United States Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738

RE: Perry Nuclear Power Plant
Docket No. 50-440

Subject: Response to "Reply and Answer to a Notice of Violation and Proposed Imposition of Civil Penalty -\$110,000 (NRC Office of Investigations Report No. 3-98-007)"

Dear Sir:

On March 10, 2000, I obtained a copy of the "Reply and Answer to a Notice of Violation and Proposed Imposition of Civil Penalty -\$110,000 (NRC Office of Investigations Report No. 3-98-007)" from the Nuclear Regulatory (NRC) Public Document Room (PDR). After reviewing this document, I feel obligated to respond to it. Additionally, I am requesting that the NRC place a redacted copy of this letter (as attached) in the PDR.

On or about **August 10, 1995**, Centerior Energy/Cleveland Electric Illuminating (CEI) Company hired me as an Engineer-Nuclear at the Perry Nuclear Power Plant (PNPP).

During my employment at Perry Nuclear Power Plant, I identified safety concerns with the following issues:

1. Programmatic inadequacies in the radioactive material control program resulting in the unauthorized release of radioactive material to uncontrolled areas (**Nov., 1995**).
2. Inadequate Radiation Exposure Control (ALARA) to workers during the fifth refueling outage (**Jan-Apr., 1996**)
3. Inadequate investigation and improper closure of corrective actions for Potential Issue Forms (Concern Reports) (**Various**)
4. Intimidation and harassment of employees by supervisory and middle/upper level management personnel in retaliation for identifying and documenting safety issues (**Feb.-Mar., 1996; Feb., 1997**).
5. Staffing and training concerns for the Radiation Monitoring Team (RMT) Leader (an Emergency Plan position that is staffed during accidents), including failure to provide training prior to assignment, qualifications for assignment, and commitments made by the Perry Nuclear Power Plant to the NRC that were not being properly tracked, controlled or implemented (**Jan., 1997**).

On or about **March 19, 1997**, Perry Nuclear Power Plant terminated my employment. A final decision concerning my allegations of wrongful termination by PNPP is pending before a Department of Labor (DOL) Administrative Law Judge (ALJ).

JE14
Public per
Denny Summers

DE-006

On February 5, 2000, I submitted a Freedom of Information Act (FOIA) request to the NRC to obtain a complete copy of the documents provided to the Perry Nuclear Power Plant under FOIA/PA 1999-0244. The NRC acknowledged receipt of this FOIA request in a letter to me dated February 29, 2000, and assigned **FOIA/PA Request No 2000-0150** to my request. The original FOIA/PA 1999-0244 documents that I requested were the NRC Office of Investigations Report and supporting documents related to this matter that had been supplied to the Perry Nuclear Power Plant (PNPP) on or before December 29, 1999. I have yet to receive these same documents from the NRC, but feel obligated to respond, even without them available to me. I believe I possess enough knowledge and documentation to adequately respond at this time without the additional information contained in FOIA/PA 1999-0244. Additionally, I reserve the privilege to provide additional information in the future, as needed.

Response Summary

Based on the information I have available to me, I can reach no conclusion other than it is clear that the Corporate Attorney (CA) and the Radiation Protection Manager (RPM) colluded to obstruct and interfere with a protected proceeding brought about under the ERA. Specifically, the CA and the RPM willfully and deliberately engaged in witness intimidation tactics with three witnesses who were about to testify for me in a positive manner in a DOL proceeding. Subsequently, and additionally, the CA and RPM then discriminated against the Radiation Protection Supervisor (RPS) through placement of a disciplinary letter in the RPS's personnel file. Such actions represent a careless disregard and obvious disrespect of law and regulation (and potential consequences and accountability for violation) on the part of PNPP.

Circumstance and Indisputable Facts

Below, I have listed the undisputed facts (without embellishment or opinion). These 'indisputable facts' are listed in order of relevance and order of occurrence, as I know it.

1. The CA is an experienced nuclear industry attorney, and had previous experience in ERA employment discrimination cases (McCafferty v. Centerior for example).
2. The RPM, is an experienced employee with an extensive background in the nuclear industry...
3. The RPM distributed subpoenas for the pending DOL depositions to the three witnesses on or about the first week of July, 1997.
4. Witnesses (1), (2) and (3) were engaged in protected activity, based on either receiving subpoenas to appear in deposition for a DOL hearing, on or about July 2, 1997, or by earlier informing management that they intended/expected to be a witness in such a proceeding.
5. The CA knew that the RPS (Witness 1) was subpoenaed and scheduled for deposition on July 17, 1997.
6. CA was engaged in contentious litigation with the Terminated Employee (TE)
7. Witness (1) and Witness (2) worked for the RPM.
8. Witness (3) did not work for the RPM.
9. On July 16, 1997, the RPM counseled Witness (2) on the company's "conflict of interest policies". [Omitted in company response].
10. On July 16, 1997, Witness (2) signed an affidavit for a Protective Order drafted by the CA.
11. On July 16, 1997, Witness (2) called Witness (3) and informed him about the company's "conflict of interest policies" and his discussion with the RPM.

12. On July 16, 1997, Witness (2) **DID NOT** call Witness (1) and inform Witness (1) about the company's "conflict of interest policies" and his discussion with the RPM.
13. On July 16, 1997, Witness (3) drafted and submitted a "conflict of interest letter" to his supervisor in the PNPP Nuclear Engineering Department.
14. On July 16, 1997, the CA placed a **telephone call** to the RPM, and identified Witness (1) as a leak of information.
15. On July 16, 1997, the RPM counseled the Witness (1) concerning the company's "conflict of interest" policies.
16. [On July 16, 1997, Witness (1) received a page and telephone call from the RPM's secretary, with the message that he would be represented the next day by a second CA (who worked for CA)]- (This issue was not properly or fully investigated by the NRC)
17. On July 17, 1997, Witness (1) attended his deposition in the DOL proceeding.
18. On July 17, 1997, Witness (1) *declined company attorney representation during the deposition.*
19. On July 17, 1997, Witness (3) attended his deposition in the DOL proceeding.
20. On July 17, 1997, Witness (3) allowed the second company CA (who worked for CA) to represent him during the deposition [Witness (3) indicated during deposition that CA 'solicited' him and asked him if the second CA could represent him during deposition. Witness (3) accepted the company offer.
21. On July 17, 1997, Witness (2) initially refused to participate in his scheduled deposition.
22. On July 17, 1997, Witness (2) arrived at the deposition location.
23. On July 17, 1997, Witness (2) would have allowed the second company CA to represent him during deposition. ["Q. I'm not asking you for anything that you've told your attorney I would like to know what date you hired an attorney to represent you in this matter dealing between Perry Nuclear Power Plant and <TE>? A My understanding was that the moment I engaged conversation with CA that I was entering into a client-attorney relationship"- Deposition of Witness (2), June 5, 1998, page 35]
24. On July 17, 1997, my attorney declined to depose Witness (2).
25. On July 17, 1997, RPM drafted Witness (1)'s counseling letter.
26. On July 23, 1997, RPM placed the counseling letter in Witness (1)'s personnel file.
27. On July 23, 1997, RPM sent 'cc' copies of Witness (1)'s counseling letter to the CA and PNPP Human Resources.

In my opinion, any actions that are referenced, or that occurred after **July 23, 1997** are irrelevant to the issue of the violation and are only intended by company counsel and employees to obfuscate the central issues of the violation.

Use of Circumstantial Evidence and Witness Credibility to Determine Illegal Intent

Without the "smoke and mirrors", the facts of this case tumble to a simple and logical conclusion that any reasonable person could accept and believe. Through nothing more than a straightforward exercise in

Philosophy 101 (Logic), full consideration of the circumstances, and comparing each circumstance for similarity and difference, the answer is glaring:

The CA and the RPM, in concert, knowingly, willfully and deliberately engaged in witness intimidation tactics with three witnesses who were about to testify for a TE in a positive manner in a DOL proceeding. Subsequently, and additionally, the CA and RPM then discriminated against the Radiation Protection Supervisor (RPS) through placement of a disciplinary letter in the RPS's personnel file.

I tend to believe and follow the 'old adage' that says that the 'simplest answer to the problem is the right answer'. Another appropriate adage for this situation might be "if it looks like a duck, walks like a duck, and quacks like a duck, it's a **duck**".

Circumstantial Evidence

The courts have clearly noted that there is rarely "smoking gun" evidence of retaliation (See *Marchese v. Goldsmith*, 1994 U.S. Dist. LEXIS 7940 (E.D. Pa. 1994), *aff'd without op.*, 1995 U.S. App. LEXIS 2694 (3d Cir. 1995) (order denying motion for new trial in First Amendment case; related Part 24 action 92-WPC-5)). The court noted that "proof of an illegal motive often requires inference from the circumstance...". Stated another way, it is highly unlikely that a person is going to belly up to the bar and say "Yeah, I knew what I was doing, knew it was illegal, and did it anyway". Therefore, the truth must be inferred or deduced from the circumstances at hand. The use of circumstantial evidence may be required to support and prove 'intent'.

Employee protection cases can appropriately rely upon the use of circumstantial evidence to support discriminatory intent. The NRC should be cognizant of this fact. PNPP counsel is most likely aware of this fact. The Secretary of Labor has clearly recognized this frequent need, and stated in *Fradley v. Tennessee Valley Authority*, 92-ERA-19 and 34, slip op. at 10 n. 7 (Sec'y Oct. 23, 1995), that "ERA employee protection cases may be based on circumstantial evidence of discriminatory intent". The issue at hand is one of employee protection for engagement in a protected activity. The Secretary of Labor's permission would be appropriate for use in this matter.

Witness Credibility

Please consider the below listed company statements, obtained from PY-CEI/NRR-2471 L, Attachment 1, and my associated response to these statements, as you complete your final review of the enforcement action against PNPP. The responses address several credibility issues with the company "story".

Company Statement:

"In the course of representing FENOC in the two cases filed by the Terminated Employee, Corporate Counsel felt that the Terminated Employee's counsel had possession of certain FENOC **documents that had not been produced by the company during discovery.**" (emphasis added) (Attachment 1, PY-CEI/NRR-2471 L, Page 6 of 17)

Response:

Document discovery **was not executed** between the parties in litigation until **July 18, 1997 and thereafter**. No documents changed hands until after July 18, 1997. Therefore, CA had no credible basis for believing that TE's counsel had possession of certain **FENOC documents on or before July 16 and July 17, 1997, when the acts of witness intimidation and discrimination occurred**. The issue of 'documents' is nothing more than a legal construct and legal fiction fabricated by the CA and the company counsel for purposes of litigation in an effort to justify her illegal actions, and perhaps to retaliate against Witness (1) for his 'failure to cooperate'.

Company Statement:

“Corporate Counsel <CA> also "*suspected strongly*," based on *comments by the Terminated Employee's lawyer*, that the Supervisor had been disclosing confidential *information* to the Terminated Employee and his attorney. at p. 20; at pp. 10-11. (emphasis added) (Attachment 1, PY-CEI/NRR-2471 L, Page 6 of 17)”

Response:

This company statement says that the CA “*suspected strongly*” that Witness (1) had been disclosing confidential *information* to the Terminated Employee and his attorney (documents not mentioned.). It is illustrative to define the word ‘suspect’ and it’s derivative, ‘suspicion’, for the reader at this point.

Webster’s Dictionary defines ‘suspect’ as [having a *vague* belief or *fear* of the existence of; to *imagine to be guilty* upon *slight evidence* or *without proof*. To hold certain *suspicions*]. Webster’s Dictionary further defines ‘suspicion’ as [the *thought* or *impression* that there is probably something wrong *without clear proof or evidence*]. In the first place, it appears that using the word ‘evidence’ in a heading, and then to discuss “suspicions” in the text directly beneath that heading, is an oxymoron. The CA had thoughts, impressions, vague beliefs and *imagined* Witness (1) to *be guilty* with little to no proof. The CA’s ‘suspicions’ indicate ‘mistrust’ and *animus* (hostile spirit and antagonism) by the CA toward Witness (1).

Company Statement:

“Corporate Counsel played a videotape, which explained the deposition process.”

Response:

I am certainly having difficulty understanding this action on the part of the CA. The TE subpoenaed Witnesses (1), (2) and (3) for deposition in a DOL proceeding. The CA **did not** subpoena the same Witnesses. At the time that the subpoenas were delivered, TE expected these witnesses to testify in a positive manner for him in the proceeding. Witness (2) called TE in **June, 1997**, to inform TE that “he and Witnesses (1) and (3) hadn’t been subpoenaed for the DOL hearing by the company”. During the June 1997 call from Witness (2), TE was informed that Witness (2) would be “happy to be subpoenaed by him for the hearing”. The subject subpoenas were executed and delivered on or about **July 2, 1997**. These subpoenas were hand-delivered to these individuals by the RPM. The company did not schedule depositions for any of its witnesses and did not subpoena Witnesses (1), (2) or (3). If the company had scheduled depositions, it would have been TE’s right to attend and participate in those proceedings.

According to deposition testimony of Witness (2), the ‘videotape’ viewing occurred “the week before July 13th <1997>”(Deposition of Witness (2), Friday, June 5, 1998 for Case No. 97 CV#####, page 36).

Company Statement:

“She accordingly cautioned the Supervisor that **disclosure of their conversations** to the Terminated Employee or his attorney could compromise FENOC's legal strategy, and that these conversations were legally protected and privileged.”

Response:

I am at a loss as to understand how a person that is **NOT** represented in an attorney/client situation by the CA, and who **never** was represented by the CA, can be told that their conversations were legally protected and privileged. In fact, such a directive could be interpreted to establish restrictions on communication that would seriously undermine the purpose and intent of whistleblower laws to protect the public health and safety (*Talbert v. Washington Public Power Supply System*, 93-ERA-35, slip op. at 8 (ARB Sept. 27, 1996) (citations omitted). (PROTECTED ACTIVITY; FAILURE TO FOLLOW ESTABLISHED CHANNELS OR CIRCUMVENTION OF SUPERIOR [N/E Digest XII D 1 d]. In essence, it is direction

that could be interpreted with the *intent to discourage* an employee from engaging in protected activity, especially if the content of such conversations contained information that would be directly related to wrongdoing (or perhaps *specific wrongdoing on the part of the CA*) under the ERA. Such discouragement would be clearly unacceptable and illegal.

The above referenced statement discusses “FENOC’s legal strategy”, and CA’s belief that **disclosure of their conversations** (between Witness (1) and the CA) could somehow compromise this strategy. I find it very difficult to believe that the CA, who was *suspicious* of Witness (1), and “*suspected strongly*” that Witness (1) was providing TE with confidential company information, would discuss anything of substance related to her legal strategy (as Corporate lead counsel) in the TE’s case. Based on the fact that a state-sponsored temporary injunction hearing in this matter had already been held on March 21, 1997, and based on the method’s employed and letters written about TE prior to the employment termination, it wouldn’t take a ‘rocket scientist’ to figure it out the company ‘strategy’.

Why would the CA be so concerned about disclosing the conversations she had with Witness (1)? Why would she claim that the discussions were legally protected and privileged? In July, 1997, Witness (1) was asked a question by the CA during the DOL hearing for the TE (TR 834/835). This question and answer were as follows:

CA: Okay. Do you know who terminated <TE>?

Witness (1): You told me that you had a part in that. (emphasis added).

This testimony was obtained during the DOL hearing on **July 28, 1997**.

Company Statement:

“On or about July 13, 1997, the Terminated Employee's former Work Team Supervisor <(WTS) my direct supervisor, who was named as a party to discrimination in the DOL employment discrimination proceeding>, contacted Corporate Counsel to express his concern based on a conversation with Employee One <Witness 2>.”

Response:

July 13, 1997 was a Sunday. Dates and acts around this timeframe are critical. It was in the evening of July 13, 1997 that I spoke with Witness (2). Witness (2) continued to work for the WTS after my termination. Therefore, the contact must have taken place (if at all, since I doubt it) after July 13, 1997 (perhaps Monday (July 14th), Tuesday (July 15th) or Wednesday (July 16th)). I doubt the WTS would have contacted the CA late Sunday evening. Note that Witness (1) and Witness (3) **did not work for the WTS** at the time of the alleged ‘contact’.

Company Statement:

“**On July 15, 1997**, Corporate Counsel <CA>received a phone call from Employee One <Witness 2>. Employee One informed Corporate Counsel that he had recently received a phone call from the Terminated Employee <TE> during which he attempted to intimidate Employee One and influence his deposition testimony.~ at p.11 ;~ at p.18.”(Attachment 1, PY-CEI/NRR-2471 L, Page 7 of 17)

Response:

Without citing a reference, the company makes a **statement of fact** that the subject phone call took place on **July 15, 1997**. The phone call by Witness (2) to the CA **did not** occur on **July 15, 1997**. The phone call by Witness (2) occurred on Wednesday, **July 16, 1997** (three days after Witness (1)’s telephone discussion with me on Sunday). There is specific relevance to this matter that escaped Witness (2) during deposition.

The relevance of the date of the phone call is that it is done on the **same day that the RPM counseled Witness (2) on 'corporate policies' about loyalty, the release of information, and the penalty for violating these policies (termination)**. This is the same day that Witness (2) signed the affidavit for CA's protective order. This is the same day that the RPM also 'counseled' Witness (1). The **fact** that RPM counseled Witness (2) on **July 16, 1997, on the same day as Witness (1)** is a blatant omission in the Company response dated 2/25/00. The omission of a crucial point by the company, and the incorrect and inaccurate date of the phone call between CA and Witness (2), have significant relevance, but are just 'coincidental'? I think not. It is what it is. It is a calculated attempt by the company to deceive readers of the reply (including the NRC), about the facts.

The facts are that the RPM counseled both Witness (1) **and** Witness (2) on 'corporate policies' on **July 16, 1997**, just one day prior to scheduled depositions in a DOL proceeding (the proceeding being a protected activity). The facts are that Witness (1) and Witness (2) were the **only employees** of the RPM that were counseled by the RPM on these corporate policies on July 16, 1997. The facts are that **neither** Witness (1) or Witness (2) worked directly for the RPM, but were in fact, separated from the RPM in the organization by a level of management supervision (what was he doing '**involving himself**' in this matter?). The facts are that Witness (2) was counseled by the RPM, called the CA, and signed an affidavit for a protective order for the CA on **July 16, 1997**. The facts are that Witness (2) 'cooperated'. The facts are that Witness (2) did not have a disciplinary counseling letter placed in his personnel file. The facts are that Witness (1) refused to 'cooperate', and subsequently had a disciplinary 'counseling letter' placed in his personnel file. Webster's defines discriminate as [To make a distinction, as in favor of or against a person or thing,...on between persons on the basis...<other> than individual merit]. Witness (2) was 'intimidated' into cooperating. Witness (1) would not cooperate. This is the distinction. Witness (1) was subsequently discriminated against for 'not cooperating' by placement of the disciplinary letter in his personnel file.

Consider the following facts. Witness (2) waited (3) full days, from **July 13, 1997 to July 16, 1997**, before he called the CA. The phone call between TE and Witness (2) occurred on Sunday, **July 13, 1997**.

Consider the following testimony of Witness (2), obtained **under oath**, on June 5, 1998:

Deposition of Witness (2), June 5, 1998, page 33

"Q. Okay Now, can you tell me, <Witness (2)>, if you thought it was inappropriate on Sunday, that Sunday, why it took you **three days before you told anybody you thought it was inappropriate?**

A. I ponder things and I have other things on my plate. And that's -- I don't understand why there would be any relevance to the three days, but that's about it.

(emphasis added)

Would any reasonable person believe that these are the words of a person who felt intimidated, harassed, and threatened during a phone call? Would a person who was intimidated, harassed and threatened wait three full days to 'tell someone about it'? Is it coincidence that he was counseled by the RPM on the same day that he called the CA and provided an affidavit for the CA.? Witness (2) **was scared** to testify.

I did not attempt to influence Witness (2)'s testimony. I was 'surprised' and disappointed that his apparent position had 'shifted'. I had considered him a friend and a person of honesty. I no longer hold an opinion on either position, but now believe I understand **why** he did **what** he did.

Company Statement:

"Employee One <Witness (2)> reported to the Work Team Supervisor that the Terminated Employee <TE> had asked Employee One <Witness (2)> to provide him with a "tech spec and some other internal plant document" from Perry. Employee One <Witness (2)> had refused to provide these documents, but told the Work Team Supervisor that the Terminated Employee had also asked the Supervisor to provide him with the same documents.

Response:

I do not believe I requested that Witness (2) get me a copy of a “tech spec *and some other internal plant documents*”. However, the tech spec, which is directly quoted by the company, is a **publicly available document** that was **not available** (that I could figure out at the time) in the Perry Public Library PDR. I have no idea what the company means by “other internal plant documents”.

I believe that this statement concerning Witness (2) may have been constructed from a review of the FOIA information, or other testimonies in this matter, concerning Witness (1) or (3), and then ‘extrapolated’ by the Company and the WTS to Witness (2) as a ‘fact’. Review the Protective Order Affidavit of Witness (2). Does it mention documents? No, the affidavit states that I “pumped him for information”.

Consider the testimony of Witness (2) obtained in deposition, under oath, on June 5, 1998. Consider the following crucial point and testimony:

Deposition of Witness (2), June 5, 1998, page 34,35

“Q. Okay. Okay. But my question is: <Witness (2)>, did you have any other information or understanding that <Witness (1) > had given <TE> any other information other than watching a videotaped deposition?

A. The only other thing in a conversation that – was that <Witness (1) > had mentioned something about my selling <TE> out earlier in the week. And <TE> used that same term in the conversation—accused me of selling him out.

Q. Anything else?

A. Not that I can recall.

Q. So as you sit here today, do you have any other information that you believe that <Witness (1)> gave <TE> regarding any litigation at the company?

A. No.”

Are ‘documents’ mentioned here in this testimony? No. The issue was **information**.

Witness credibility is crucial to this entire matter. Consider the following testimony from Witness (2):

Deposition of Witness (2), June 5, 1998, page 48,49

“Q. I want to go back to July 13th, 1997; okay? And that would be the phone conversation you had with <TE>; correct?

A. Right.

Q. All right. Didn't you tell <TE> that you were in a catch-22; do you remember saying that?

A. I don't recall.

Q. Do you recall telling <TE> that if you sided with the company, he would sue you, and if you sided with <TE>, you'd be fired?

A. I don't recall.”

Deposition of Witness (2), June 5, 1998, page 12,13

"A Not that I'd like to mention.

Q. What do you mean?

A. I don't recall anything else.

Q. <Witness (2)>, is your answer that that's all you can remember at this time, or is it all that you want to talk about at this time?

A. That's all I care to spend on that subject.

<Company Counsel (Not CA): <Witness (2), when <TE Attorney> asks a question, answer her question as thoroughly with your best recollection of all the courses. I've got a standing objection to this line of inquiry, because I don't think it's relevant to this lawsuit. We can address that with the Judge, but I want you to give her your full knowledge as to any questions she poses to you if you would please.

A. That's all I can remember at this time.

Q. So just a moment ago when you said that that's all you wanted to speak about at that point, you weren't telling the truth; is that correct?

<Company Counsel (Not CA): I think that's been addressed, <TE Attorney>. If you have another question, put it to the witness.

<TE Attorney> : Read back my question. I want him to answer it.

(Thereupon, the preceding question was read by the reporter.)

A. That is not correct

Q. Then why did you say it? Why did you say a moment ago that that's all you wanted to talk about at that point and now, you've changed the answer to that's all you can recall at this point?

This demonstrates that Witness (2) 'doesn't recall' when he "doesn't want to talk about it". The RPM "doesn't recall" what was said in the discussion with Witness (1) during the 'walk-around' on July 16, 1997. Witness (2) viewed a 'videotape' presented by the CA, during the week prior to July 13th, on how to give testimony in deposition. Witness (2)'s 'testimony' (as described by others) is crucial to the company's 'document' issue and basis for taking action against Witness (1).

Company Statement:

"The Terminated Employee interrogated Employee One <Witness (2)> about his beliefs regarding the propriety of the termination, and when Employee One <Witness (2)> informed the Terminated Employee he thought the latter deserved to be fired, the Terminated Employee *threatened* Employee One. ~at pp 10-1 1,~ Affidavit in support of Motion for Protective Order."

Response:

I never threatened Witness (2) about anything. The affidavit that is referenced was signed by Witness (2) on the **same day** he was counseled by the **RPM**. The affidavit that is referenced was signed by Witness (2) for the **CA**.

Company Statement:

“The Terminated Employee said that he would publicize an unauthorized tape recording he had made that contained some unfavorable comments that Employee One <Witness (2)> had made about his Work Team Supervisor <WTS> if Employee One <Witness (2)> testified against the Terminated Employee. ~at p.11.”

Response:

This is a **total and complete fabrication**. Credibility is the issue.

Company Statement:

“The phone calls from the Work Team Supervisor <WTS> and Employee One <Witness> (2)> supported Corporate Counsel's **belief** that the Supervisor was the likely source of the unauthorized disclosure of documents and information.” (emphasis added)

Response:

Included as Attachment 1 to this letter is a redacted version of memo/notes, written by a Perry Human Resources Analyst that was completed on or about **February 9, 1997**. The date of this **memo**, and its contents, are significant. Additionally significant is the fact that, contrary to an ALJ's order to do so, **CA** and the company **did not produce** this document during **discovery** for the original **July, 1997** DOL hearing.

There is clearly an equivalent pattern of behavior, on the part of the individuals involved in the decision to discharge TE, with reference to the issue of discrimination against Witness (1). There is a generally questionable and consistent involvement of the CA in employment matters involving persons engaged in protected activity at PNPP.

There is a connection (and thus common interest in the ‘successful outcome’ of any pending reviews relating to the discharge of the TE) between the **CA**, the **WTS**, and other management personnel at the Perry Plant. This connection is alleged wrongdoing on the part of the individuals involved in the discharge of the TE that they did not want revealed. CA was involved in the termination of TE. The CA told Witness (1) that she had a part in TE's termination (as shown earlier). During the associated DOL hearing in July 1997, the CA informed the ALJ that **she had nothing to do with TE's termination**. Credibility is the issue.

For purposes of Attachment 1, “TE” refers to the “Terminated Employee”, “VPN” refers to the then Vice President Nuclear – Perry Nuclear. “PM” refers to the then Plant Manager. “WTS” refers to the then TE's Work Team Supervisor (who current still holds a similar position). “ARPM” refers to the then acting Radiation Protection Manager (who is now a licensed operated at the Perry Plant). “CA” refers to the Corporate Attorney that is described in Section C of the company response letter (Attachment 1, PY-CEI/NRR-2471 L). “2nd CA” was an attorney working for “CA” at the time. “HR Analyst” was the author of the Attachment 1 memo.

The 2/9/97 memo speaks for itself. After reviewing this memo, one simply needs note the facts of Witness (1)'s case, and then ask some very simple questions. Consider the following:

Fact: A counseling letter was placed in Witness (1)'s file.

- a. Would the CA recommend the placement of counseling letter in someone's personnel file?
- b. Would the CA review such a letter before it went in the personnel file?
- c. Would the CA provide guidance and advice to the supervisor on what to go over with the 'problem employee' in the counseling session?
- d. Would the CA use a letter in a personnel file as a way to 'set up' an employee for termination?

Fact: On July 17th, 1997, Witness (1) sent a letter to the company alleging harassment and intimidation.

- a. Would the CA get involved in such a matter?
- b. Would the VP-Nuclear (VPN) get involved in such a matter?

Based on the 2/9/97 memo, the answer would be yes to all of these questions. Credibility is the issue.

Consider the fact that in June 1997, in a DEFENDANTS' RESPONSE TO PLAINTIFF'S FIRST SET OF REQUESTS FOR ADMISSIONS, the company responded to a question concerning a meeting between TE and VPN as follows:

249. Admit that Plaintiff met with <VPN>, Vice President-Nuclear, on February 4, 1997 to discuss alleged discrimination, and/or intimidation and/or harassment by Defendant and/or Perry Nuclear Power Plant.

RESPONSE: Deny. (emphasis added)

In June, 1997, in an official court document, the company denied that a meeting took place between the TE and the VPN. 'Coincidentally', the 2/9/97 memo (Attachment 1) was not produced by CA for a DOL hearing in July 1997 (approximately one month after the denial of the existence of such a meeting). Attachment 1 clearly establishes that a meeting to discuss intimidation and harassment did take place (actual date of meeting was 2/4/97). The content of the meeting is a matter of judicial record, and included the allegation of intimidation and harassment, as well as the identification of other safety concerns. Credibility, respect for the law and the legal process are the issues.

Other Issues

The letter to Witness (1)'s personnel file was an Adverse Employment Action, Discriminatory and Disciplinary.

When the Perry Plant Ombudsman removed the letter from Witness (1)'s file, he specifically identified the letter as '**disciplinary**'. The company has blatantly omitted this fact from their response. "Even though a **disciplinary** letter does not result in a firing or demotion of a complainant, such drastic action is not required to render such a letter adverse". *See, e.g., Self v. Carolina Freight Carriers Corp.*, 89-STA-9 (Sec'y Jan. 12, 1990), slip op. at 15 (warning letters that "served to progress [the c]omplainant toward suspension and discharge" adversely affected him even though the letters did not result in suspension or discharge). *Helmstetter v. Pacific Gas & Electric Co.*, 86-SWD-2 (Sec'y Sept. 9, 1992).

In the case of the disciplinary letter in Witness (1)'s personnel file, he had been put on notice that he was to 'disclose all discussions he had with the TE'. If he violated this condition of the letter (which was clearly illegal in its direction), he could have been fired. Therefore, the letter, which was disciplinary, discriminatory and illegal (establishing restraint in how safety concerns are voiced, reported/impacting his first amendment rights) served to progress Witness (1) toward suspension or dismissal.

The RPM, is an experienced employee with an extensive background in the nuclear industry.

Does anyone in the entire nuclear industry really believe that the RPM, an experienced employee with an extensive background in the nuclear industry (so the licensee stated), did not know the employee protection requirements under the ERA? If the RPM was really 'trying to keep out of it', why did he counsel (2) employees, (and only these (2) employees), about Conflict of Interest policies, on the day before scheduled depositions in a DOL hearing? [Gee, the company didn't mention that one in their response.

The disciplinary letter placed in Witness (1)'s personnel file was "cc'd" to the CA and to Human Resources.

If someone in management counseled me about a matter as serious as "conflict of interest", with the knowledge that being in a conflict of interest could result in my termination, and then sent copies of the counseling letter to a **Corporate Attorney AND Human Resources**, I would be just a little upset. I think any reasonable person in any job would feel the same way. The Ombudsman said the letter was 'disciplinary'. A disciplinary letter, sent to HR and a CA, is NOT a good sign.

Closing

In closing, I would like to draw the NRC's and the public's attention to case law related to ERA employment discrimination precedence as it applies to witness intimidation issues. Specifically, as it relates to my employment discrimination case before the DOL:

"Misconduct in the presentation of a respondent's case could both be a possible violation of 18 U.S.C. § 1505, and give rise to the discrediting of testimony or documentary evidence". (EVIDENCE; EVENTS OCCURRING SUBSEQUENT TO ADVERSE ACTION; WITNESS INTIMIDATION, *Remusat v. Bartlett Nuclear, Inc.*, 94-ERA-36 (Sec'y Feb. 26, 1996).

Credibility is the issue.

**"The Simplest Answer to the Problem is the Right Answer"
"If it looks like a duck, walks like a duck, and quacks like a duck, it's a duck"**

"Based on the information I have available to me, I can reach no conclusion other than it is clear that the Corporate Attorney (CA) and the Radiation Protection Manager (RPM) colluded to obstruct and interfere with a protected proceeding brought about under the ERA. Specifically, the CA and the RPM willfully and deliberately engaged in witness intimidation tactics with three witnesses who were about to testify for me in a positive manner in a DOL proceeding. Subsequently, and additionally, the CA and RPM then discriminated against the Radiation Protection Supervisor (RPS) through placement of a disciplinary letter in the RPS's personnel file. Such actions represent a careless disregard and obvious disrespect of law and regulation (and potential consequences and accountability for violation) on the part of PNPP."

I hope you can take the above matters into consideration as you review the company's response, and decide what further or final actions are indicated.

Thank you for your time and attention in this matter. If you should have questions, please don't hesitate to contact me.

Sincerely

Original Signed

- Attachment:
1. Redacted Copy of 2/9/97 Memo/Notes (2 Pages)
 2. Redacted Copy of this Letter for PDR Distribution (15 Pages)

This fax/letter sent to fax number (630) 810-4377 on March 19, 2000.

Attachment 1

Redacted for privacy

TE File Notes

VPN contacted me on 2/5/97 and indicated that TE had informed him that he was being harassed and intimidated by the Plant Manager, PM, and by his supervision, WTS and ARPM.

Redacted for privacy reasons.

Redacted for privacy reasons.

VPN also asked me to check with Legal and give him a recommendation on what we could do to make the problem go away. Redacted for privacy reasons.

I met with ARPM and PM on 2/6 at their request. PM wants the employee terminated. Redacted for privacy reasons.

Later in the day on 2/6 I met with WTS and reviewed the employee notes and file on TE. WTS did a thorough job documenting all interactions with this employee. There were several inconsistencies that I asked WTS to explain:

Redacted for privacy reasons.

3. The 6-month appraisal on TE indicated behavioral problems yet the one year appraisal that was done in December, 1996, indicates "meets expectations" and no references to his behavioral problems are noted, why?

WTS stated that while the NRC investigation was on-going (from June to December), TE kept a low profile. He did his job and was not a behavioral problem during this period. Further, since the NRC investigation was still open, he was instructed by his management to delay disciplinary action on TE behaviors until this investigation was complete.

Redacted for privacy reasons.

During a meeting with VPN on February 7, he asked what the status was on my investigation on the TE case. I explained that based on the recent favorable performance review, I felt we did not have a strong case for termination. VPN felt one option was to transfer TE into a different work group under different supervision that would do performance reviews on a quarterly basis. The end objective, however, is to make this employee go away.

I spoke with CA from Legal on 2/7. She indicated that TE's supervisor, WTS should immediately do a Coaching and Counseling Session with TE on his behavior and lay out expectations and results if his poor behavior continues. She and 2nd CA will review the file and will call me on Monday or Tuesday with recommendations on what we should do to make the problem go away.

I met with WTS late on 2/7. He and ARPM (section Manager) will do the Coaching and Counseling Session with TE on Monday, 2/10. They expect that he will walk out of the meeting and if so, will take appropriate action.

CA will review the coaching & counseling letter with WTS prior to his meeting with the employee and will gain legal advice on actions to be taken if TE does not cooperate.

Legal's recommendation and the planned actions by the department were relayed to PM and VPN late on 2/7/97.

HR Analyst
2/9/97