

January 17, 2001

Mr. R. William Borchardt
Director, Office of Enforcement
U.S. Nuclear Regulatory Commission
Mail Stop O-14 E1
Washington, DC 20555-0001

**SUBJECT: Discrimination Task Group Evaluation of NRC Processes Used to Handle
Discrimination Allegations and Violations of Employee Protection Regulations**

Dear Mr. Borchardt:

Exelon Generation Company (Exelon) is pleased to provide comments to the Discrimination Task Group in connection with the ongoing evaluation of the processes and standards that the Nuclear Regulatory Commission (NRC) uses to assess allegations and enforcement actions related to violations of the NRC's employee protection (that is, "discrimination") regulations. Exelon has made presentations during the Discrimination Task Group stakeholder meetings at NRC Headquarters and in Region III. In the present document, Exelon provides some further comments for consideration by the Task Group.¹

As will be discussed further below, this letter provides Exelon's recommendation that the NRC revise its enforcement guidance for analyzing potential discrimination violations. In addition, we recommend that the NRC reform its processes for development and review of these actions to assure that the revised guidance is consistently and appropriately applied. We believe that these two steps are needed to assure that the NRC's treatment of these cases is premised on a thorough review of all of the evidence of a given case and that it respects the balance currently drawn in the regulations to allow employment actions that impact protected employees, as long as those actions are based on legitimate considerations. Otherwise, the NRC enforcement focus in discrimination cases will unfairly impact capable and well-intentioned nuclear professionals and may actually chill management in the necessary and appropriate exercise of its functions.

¹ Exelon is aware that the Nuclear Energy Institute (NEI) has also participated in the stakeholder meetings and is submitting comments to the NRC Discrimination Task Group. Exelon participates on NEI's Task Force on this issue and supports NEI's comments. The purpose of the present letter is to provide the individual perspectives of Exelon and to emphasize the points of particular concern to Exelon based upon our own experiences with these issues.

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At the outset, Exelon endorses the regulatory objectives of the employee protection regulations. Exelon and its management team recognize the importance, not only to nuclear safety, but to efficient and economic plant operation, of an open and safety-conscious work environment. Employees must feel free to raise issues and to adopt a questioning attitude. Supervisors and managers are in turn trained in their obligations to support this culture and to respond to issues in a timely and professional fashion. The corrective action programs in place at our nuclear stations are also essential to supporting this work environment and to sustaining successful nuclear operations.

Nonetheless, despite our complete agreement with the NRC's overall regulatory goal, Exelon is concerned by the course that the NRC has adopted in the investigation and enforcement of some recent allegations of discrimination. In these cases the NRC appears to have adopted inappropriate standards for assessing the evidence and applying the regulations, and less than thorough internal management review and oversight—leading to enforcement results that are simplistic and contrary to the facts, law, and good policy.

As applicable to nuclear power reactor licensees, 10 C.F.R. 50.7 appropriately prohibits adverse employment action against employees who have raised nuclear safety issues or otherwise engaged in protected activity. Conversely, however, Section 50.7(d) strikes an important balance: "[a]n employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by non-prohibited considerations." The NRC, in its current enforcement approach, seems to have lost sight of this aspect of the regulation. By liberally basing conclusions on "inferences," by refusing to acknowledge legitimate management objectives and rationales, and by applying very low thresholds for enforcement, the agency seems to have eliminated both the letter and intent of Section 50.7(d).

Under the regulations, for an enforcement action to be appropriate, there must be intent to retaliate—there must be a connection between protected activity and adverse action. Although there is seldom direct evidence of retaliatory intent and intent can be difficult to prove, it is not an acceptable "solution" to this difficulty for an enforcement action to be premised on an almost arbitrary assignment of intent to retaliate based upon thin inferences of connections between the allegedly adverse action and the protected activity or upon the simplistic assumption that all of manager's explanations are "pretextual." In recent cases, enforcement has been taken based on no more than a simple "temporal proximity" between protected activity and adverse action, or the mere fact that a performance assessment was "related to" raising safety questions. This approach often ignores a much fuller context that supports the legitimacy of management's actions. Enforcement actions that may significantly impact an individual's career, and that could actually negatively affect the work environment, should be based on more than simple inferences.

Supervisors and managers in the nuclear industry have a great responsibility and an often difficult job. They must set standards and hold individuals accountable to meet those standards. A consistent failure to do so will almost certainly impact an organization's performance and effectiveness. Supervisors and managers must also make decisions, that while

not intended as "adverse," may nonetheless affect the careers of individual employees. Job assignments, training opportunities, and career development paths are determined based upon a host of often subjective factors. A failure to make these decisions would be a failure of management to manage. But almost certainly, not all employees can or will be pleased by all of these necessary decisions.

Applying the NRC's current approach to analyzing discrimination cases in this work environment is inappropriate and counter-productive. Management has an obligation to assure organizational performance, and not every decision that leaves an employee dissatisfied should be considered "adverse." Moreover, the managers at the station, close to the situation, are in the best position to make the subjective performance assessments and career development decisions needed to enhance the performance of both individuals and the organization. The problem Exelon perceives with the NRC's current approach to discrimination cases is that it overly simplifies what is in fact a more complex situation. Simple inferences of the "adverseness" of an action or of retaliatory intent do not capture the totality of circumstances in real cases. And, this approach implicitly moves the final authority for these decisions from the managers on the scene to government agency personnel who would substitute their judgment for that of the manager based on a narrow set of facts and 20-20 hindsight.

Recent enforcement actions based upon simple inferences of retaliatory intent may actually interfere with management and supervisors in their exercise of necessary duties. Discrimination violations are widely publicized and can significantly affect the careers of the professionals involved and the environment in the workplace. Managers subjected to individual enforcement can be even more severely affected. While some might argue that this is good regulatory policy, a strong deterrent to discrimination, we strongly disagree. The threat of the severe consequences of enforcement sanctions, as well as the related publicity, will give any manager reason to pause in making difficult decisions. The chilling effect on legitimate management decisions (even those that are not even intended to be "adverse") is an unintended consequence of this regulatory approach that should greatly trouble the NRC.

Accordingly, Exelon recommends first that the NRC adopt detailed guidance to be used in assessing potential discrimination violations. The guidance should establish standards that:

- eliminate the current, mechanistic approach to finding intent based upon minimal inferences drawn from a relationship between protected activity and management decision,
- respect the balance reflected in 10 C.F.R. 50.7(d) and the importance of management discretion to make decisions for legitimate reasons, even if those decisions may be subjective and susceptible to differing opinions,
- require an assessment of the totality of circumstances, including all information presented by the employer, and

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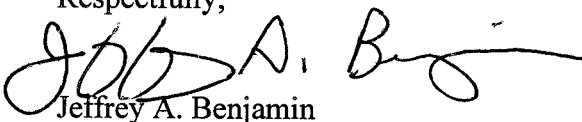
- demand a finding based upon a preponderance of the evidence for all of the elements of a violation—before any sanction (proposed or otherwise) is issued.

Exelon further recommends that the NRC revise its processes for the development and review of discrimination enforcement actions. First, having established improved guidance as discussed above, the NRC should adopt processes to assure that these standards are applied consistently and accurately in individual cases. This would include internal NRC management review and oversight processes, as the NRC has employed in the past in other enforcement cases. Discrimination cases should not be handled differently from other enforcement cases. Second, the NRC should revise its processes to assure that there is a full airing of the evidence prior to enforcement. In the normal NRC inspection program, unlike in discrimination cases, there are numerous opportunities—even prior to an enforcement conference—to exchange information and perspectives on a potential issue. In contrast, in the investigation process used for discrimination issues, there is little opportunity for open exchange of information. Once the matter goes to an enforcement conference, views often seemed to have hardened and the burden on the licensee—and on the individual accused of discrimination—to prove the legitimacy of their actions, becomes formidable.

In the NRC's most recent revisions to the Enforcement Policy the agency has moved away from traditional enforcement such as civil penalties to an oversight approach that is more risk-informed and performance-based. Exelon fully endorses this regulatory reform and believes that similar perspectives can be applied in the discrimination area. Investigation and enforcement actions in individual cases often are not necessary for the NRC to assure a work environment in which individuals feel free to raise issues without fear of retaliation. As the NRC evaluates its standards and processes for addressing these matters in the future, Exelon encourages a perspective and approach that is similar to the Enforcement Policy reforms already in place.

In closing, as stated at the outset, Exelon fully supports the rights and responsibilities of nuclear employees to raise nuclear safety issues without fear of retaliation. It would be a very rare case indeed, we believe, where an individual manager would seek to subvert this good policy, extensive training, and the law, to actually and intentionally retaliate against an employee for engaging in protected activity. A simplistic approach to discrimination enforcement is not necessary to achieve the NRC's goal and may actually be contrary to excellent plant performance and nuclear safety. Exelon recommends that the NRC adopt guidelines and review processes that will and assure a full and fair outcome in individual cases.

Respectfully,



Jeffrey A. Benjamin

Vice President

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