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Mr. Barry Westreich
Office of Enforcement
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Re: Comments on the Draft Discrimination Task Group Report

Dear Mr. Westreich:

On behalf of the National Whistleblower Center, I respectfully submit comments on the draft Discrimination Task Group Report of April, 2001.

A. NRC's Interface with the Department of Labor

The task group has recommended that the NRC stop deferring cases to the Department of Labor (DOL). Deferring is when the NRC delays starting an investigation until the conclusion of a case before DOL. The Center agrees with the task group's recommendation because DOL and NRC evaluate different aspects of a discrimination investigation. The main purpose of the Energy Reorganization Act, 42 U.S.C. § 5851 (1988) is the "protection of employees." *English v. General Electric*, 496 U.S. 72, 83 (1990). The Energy Reorganization Act gives DOL the authority to provide personal remedies for individuals that have been discriminated against by licensees for engaging in protected activities. However, DOL does not have the authority to address the underlying problem, and does not have regulatory authority over the industry.

The difference between DOL and NRC remedies are explained in case law. In *Union Electric Co.* (Callaway Plant, Units 1 and 2), ALAB-527, 9 NRC 126 (1979) ("Callaway") the appeal board pointed out that the remedies provided in a DOL case will only assist the employee as an individual. These remedies do not assist the NRC in performing the duties assigned by Congress: protecting the rights of workers in the nuclear industry and ensuring the free flow of information to the NRC. *Callaway*. 9 NRC at 138-39.

The NRC is responsible for keeping a safety conscious work environment (SCWE) in place so employees feel encouraged to report issues that may be a safety violation. The NRC is authorized to regulate the nuclear industry, and can fine the industry for violating regulations,

including 10 CFR 50.7. The NRC can take enforcement action against utilities that have discriminated to remove the chilling effect and improve the work environment so employees feel free to voice their concerns. Furthermore, the NRC has the independent investigatory authority to identify employer actions which have the effect of "discouraging whistleblowing." *U.S. v. Construction Products*, 73 F.3d at 472. This authority is necessary in order for the NRC to ensure that the "public health and safety" is not ultimately compromised by employer practices which "discourage would-be whistleblowers from coming forward." *Id.* at 471. It is clear that DOL and NRC have different responsibilities and authority over discrimination investigations.

Congress intended that the NRC have the ability to conduct its own investigations during the pendency of a DOL proceeding. Senator Hart, the Senate floor manager of the ERA noted, "the pendency of the proceeding before the Department of Labor need not delay any action by the Commission to carry out the purposes of the Atomic Energy Act of 1954." 124 Cong.Rec. Part 28 (Senate), at 29,771 (1978). Furthermore, the NRC and DOL have a Memorandum of Understanding ("MOU") which clearly provides that the NRC can take action independent of the status of the DOL's proceedings. Memorandum of Understanding between the NRC and the DOL regarding Section 210 of the ERA, 47 *Federal Register* 54585 (1982).

Since the DOL does not have the authority to fine a utility for a violation, deferring a case to them is just giving the industry more leeway in maintaining a hostile work atmosphere and not a SCWE. The current Commission in Staff Requirements Memorandum(SRM) for SECY 97-147 encourages the whole investigation to slow down. The NRC should not delay its investigation as this may result in evidence being lost and witness memories faded. This rule must be changed to make the investigation process more efficient.

The industry proposed that the NRC stop investigating and conducting hearings concerning individual complaints of discrimination of the Nuclear Regulatory Commission, "Draft Review and Preliminary Recommendations for Improving the NRC's Process for Handling Discrimination Complaints," April 2001 ("Report"), at 53. The plants where individual cases of discrimination occur are most likely to be where the work environment must be examined. If the NRC lost the power to look at individual complaints, they could not possibly get a firm grasp on where discrimination problems exist. The industry has also made the argument that a finding of discrimination is not indicative of a problem in the work environment. *Id.* The bottom line is that if there is a finding of discrimination, there is most likely a serious problem in the work environment that needs to be addressed. Ignoring discrimination complaints is equal to ignoring safety violations. The chilling effect caused by the discrimination/retaliation must be addressed.

Furthermore, under the Energy Reorganization Act, Employee Protection Provision 42 U.S.C. § 5851: (j) *Investigation of Allegation*. (1) The Commission or the Department of Energy shall not delay taking appropriate action with respect to an allegation of a substantial safety hazard. In *Rose v. Secretary of Department of Labor*, 6th Circuit Justice George C. Edwards, Jr., wrote that

"the employee protection provision in this case thus serves the dual function of protecting both employees and the public from dangerous radioactive substances." 800 F.2d 563, 565 (6th Cir. 1986) (J. Edwards concurring).

The DOL's role is not duplicative of the NRC's role. The agencies perform separate functions with distinct authority. Therefore, the NRC should stop deferring cases until the case has become final before the DOL.

B. Risk Informing the Enforcement Process for Discrimination Matters

The task group has recommended that the enforcement program for discrimination not be risk informed. Risk informed means that "the higher the individual (the reporting employee) is in the organization hierarchy the more significant the act is viewed and the resulting enforcement sanction is more significant." *Report* at 40. The Center agrees with the recommendations of the task group that the enforcement should not be risk informed. A risk informed process would create a chilled environment for employees in that NRC would only take action on allegations if they are at a significant level. Since there are no regulations governing the SCWE area, employees should be able to raise concerns without determining the significance of risk or safety. It is the duty of an employee to report something that they believe may be a safety violation. Nuclear whistleblower laws were designed to ferret out employer practices which could "deter" or "discourage" employee whistleblowing. *U.S. v. Construction Products*, 73 F.3d 464, 472 (2nd Cir. 1996). Management must encourage employees to come forward with a concern whether or not they know the full safety significance.

The Center's position is also supported in DOL case law. If the regulatory authority rules that a whistleblower concern was not a violation of a safety regulation, the whistleblower would still be protected. *Keene v. Ebasco Constructors, Inc.*, 95-ERA-4, D&O of Remand by ARB, at 8 (February 19, 1997) ("An employee's reasonable belief that his employer is violating the ERA's requirements is sufficient, irrespective of after-the-fact determinations regarding the correctness of the employee's belief"). Every concern that any employee raises should be taken seriously, even if the allegation later proves not to be a safety violation.

The Center is strongly opposed to the position of the industry, which is in favor of implementing the risk informed process into matters dealing with discrimination. The industry should re-examine the difference between technical issues and discrimination issues. Some comments made on this issue are completely ridiculous and hold no merit. One approach states that if the performance indicators and findings indicate an acceptable performance, then the NRC should take no action on discrimination cases within the passing area. There are no tested performance indicators used to indicate if a work environment is considered in healthy or poor condition. Performance indicators do not deal with character or competence issues. If there is a complaint about whistleblower retaliation, the environment should not be considered in proper condition.

Employees within the industry are the best group of indicators any company can have regarding discrimination in the workplace. Shunning the opinions of employees will have a serious impact throughout the industry. Not only will this process create a significant chilling effect on the internal communications of the industry, but it will also cause a significant public safety hazard.

C. OGC Legal Review of Draft OI Reports

The task group has recommended that an Office of the General Counsel (OGC) legal review should be performed for all substantiated discrimination cases prior to issuance of the Office of Investigation's Report. The task group believes this is necessary because a "review may help to ensure that the investigation of a case captures the needed information that will determine whether there is a legal basis for a discrimination violation." *Id.* at 25. The Center does not agree with the majority of the task group. It is the Center's view that the Office of Investigation can accomplish their job properly without additional oversight by OGC. It is important that the OI is maintained as an independent group. The OI is a group of professional investigators who can accomplish their job efficiently and properly. A better remedy to the task group's concern would be to conduct training and publish updates regarding the current status of the law and any changes thereto. This would allow OI investigators to be knowledgeable regarding what information is needed to determine "whether there is a legal basis for a discrimination violation." OI's independence is a critical factor in its existence and it's directly related to its creation in 1982. *Report* at 26. If OI and OGC do not have parallel findings in the discrimination process, there are established ways to deal with this predicament. Therefore, a review of OI reports prior to publishing is unnecessary.

D. Assessment to Support the Concerned Individual

The task group has recommended that the staff should explore how funding can be provided to allow reimbursement for the Concerned Individual and one personal representative at the Predecisional Enforcement Conference (PEC). The Center agrees with the task group, however, we think the task group should take its recommendation one step further, and appoint the industry to pay for the concerned individual and his or her representative to attend the PEC. The concerned individual is an integral part of the PEC, and all parties should want him or her in attendance. The NRC should do everything in its power to make sure the concerned individual has funds to attend the PEC.

E. Conduct of Predecisional Enforcement Conference

The task group has recommended to continue to limit the number of personal representatives the complainant may bring to the PEC. That number is one. The Center is strongly opposed to this recommendation. The Center thinks the complainant should be able to bring as many personal representatives as the licensee has the ability to bring. The complainant should not give up their

right to have his or her full legal counsel in attendance. The licensee/industry is allowed to have as many personal representatives as they wish at the PEC, and so should the complainant. This rule must be re-examined to bring a fair and efficient outcome to PECs.

The task group should give a detailed explanation why the complainant is only allowed one personal representative, while the licensee is allowed to have full legal counsel at the PEC. If time constraints is the reply, both parties should be limited to one personal representative for the PEC to move in a more efficient manner. This rule must be reviewed and changed by the task group in their final report.

The task group has recommended that the NRC staff should establish two dates within 60 days of the OI Report Issuance which are mutually agreeable to the NRC and the licensee. The complainant should be given the option of either of the two dates for the PEC. The Center disagrees with this position. The scheduling process should not be based solely on the availability of the licensee and NRC principals. This case favors the industry yet again. The scheduling of a PEC should be based on the availability of the complainant, the licensee, and NRC principals. Anything short of having the three parties present would be simply wrong and unfair to the unrepresented party and the public. All parties should have the same amount of input on when the PEC will take place.

Thank you for this opportunity to submit comments regarding these issues.

Sincerely,



Mary Jane Wilmoth
National Whistleblower Center
Program Director