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RS-01-169

August 17, 2001

Mr. Barry Westreich
Office of Enforcement
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852

SUBJECT: Comments on Draft Report of the NRC Discrimination Task Group

- References:
- (1) Volume 66, Federal Register, Page 32966 (66 FR 32966), dated June 19, 2001
 - (2) Nuclear Energy Institute letter, "Discrimination Task Group Draft Review and Preliminary Recommendations for Improving the NRC Processes for Handling Discrimination Complaints," dated August 17, 2001
 - (3) Exelon Generation Company, LLC letter, "Discrimination Task Group Evaluation of NRC Processes Used to Handle Discrimination Allegations and Violations of Employee Protection Regulations," dated January 17, 2001

Dear Mr. Westreich:

Exelon Generation Company (EGC), LLC has reviewed the draft report issued by the NRC Discrimination Task Group in Reference 1 and provides the following comments. While we appreciate the Task Group making its draft report and preliminary conclusions available for comment, we are disappointed that the draft report does not reflect a balanced view of the issues and does not offer positive reform in this area. EGC has addressed the Task Group in various public meetings and also provided written comments in Reference 3 to the Task Group during the Task Group's assessment phase. We fully endorse the comments being submitted by the Nuclear Energy Institute in Reference 2, which also advocate reform in this arena. EGC provides these separate comments based on points of particular concern to us.

General Comments

The Task Group consisted of representatives from the NRC Staff organizations with direct responsibility for handling employee protection matters. Given that the Task Group's charter was to evaluate and suggest improvements to the current process in light of the substantial concerns that have been raised about the process, it was necessary for the members of the Task Group to step beyond that status quo and to creatively air and fully explore alternatives that, truly, would improve the process. The draft report demonstrates, in contrast, that this matter has not received a full and fair evaluation. Rather, the overall conclusion of the draft report to preserve the status quo reflects the entrenched thinking of the same NRC Staff that is responsible for investigating and evaluating discrimination allegations. In preparing its final report, the Task Group should fully explore substantive improvements to the process, rather than merely dismiss change as inconsistent with the agency's regulatory responsibilities.

As in our Reference 3 comments, we note our endorsement of the objectives of the NRC's employee protection regulations. We agree that employees at licensed plants must have—and must feel free to act on—a questioning attitude about safety issues. In our view, the industry today is characterized by mature leadership that recognizes the importance of an engaged workforce, and so recognizes the value of effective corrective action programs and programs that emphasize the value of a safety conscious culture. By its own report, the Task Group acknowledges that licensee work environments today are safety conscious and that "discrimination does not appear to be a common or prevalent problem," and we agree with the report that a separate safety conscious work environment (SCWE) rule is not necessary. These internal efforts to achieve safety consciousness, in turn, assist us and other licensees in achieving superior plant performance.

Indeed, we do not consider that the current industry performance would be possible without demonstrated industry success in engaging the workforce to contribute to a safety conscious culture. Starting before the NRC's 1996 SCWE Policy Statement was issued, licensees began establishing employee concerns programs. With the NRC's oversight, the programs have matured and are now supported by well-defined training efforts, appropriate discipline policies and constant communication to employees regarding the laws and corporate policies against discrimination.

Other factors, however, are essential to sustained good performance in nuclear operations. As we noted in our Reference 3 comment letter, supervisors and managers are frequently called upon to exercise judgment and make decisions that are motivated by the legitimate business and operational goals of the organization. This includes decisions necessary to hold employees accountable to performance standards and other legitimate employer expectations. Failure to manage based on the organization's goals and failure to assure accountability would, in our view, undermine the goal of safe and efficient power generation.

Accordingly, the NRC must achieve a balance in which regulations against discrimination should be enforced in egregious instances of discrimination, but which do not chill supervisors and managers when their actions are founded on legitimate efforts to hold employees accountable. Disappointingly, the draft report summarily dismisses our important concerns regarding the chilling effect on the ability of a licensee's management team to manage and to hold workers accountable. We urge the Task Group to study this matter further and to prepare recommendations that, when implemented, will guard against even the potential for such chilling.

Enforcement Must Be Subject to Appropriate and Clear Standards

As our Reference 3 comments pointed out, existing regulations provide the means to achieve the necessary balance. 10 CFR 50.7 "Employee Protection," paragraph (d) instructs that licensees may make employment decisions based on legitimate considerations. The current NRC process, however, does not give any significant weight to that provision.

To the contrary, and despite the NRC's contentions, the legal standards used by the NRC largely disregard legitimate licensee motives and business interests. Instead, NRC investigations and enforcement decisions focus solely on whether a mere inference can be drawn that somewhere along the line in an employment decision, an employee's protected

activity "in part" contributed to the decision. The better approach, and the one provided for in 10 CFR 50.7(d), is for the NRC to consider all of the evidence surrounding an employment decision and to refrain from enforcement action if it can be fairly concluded that the licensee had a legitimate reason for the employment decision. The undue focus on minimal inferences and perceptions as a basis for enforcement has greatly upset an important regulatory balance.

It is essential for the NRC to establish clear standards for what constitutes a violation of 10 CFR 50.7, including the evidentiary standards and the burden of proof. In addition, to enhance and maintain public confidence, the implementation of these standards must be scrutable to licensees and other stakeholders. In recent enforcement actions under 10 CFR 50.7, the NRC has not well supported its determinations, and in particular does not explain how legitimate reasons offered by employers are analyzed. In this regard, the Task Group's draft report does not address the industry's concern that 10 CFR 50.7(d) is essentially ignored. At a minimum, the Task Group's final report should attempt to reconcile the NRC's enforcement approach with the policy embodied in 10 CFR 50.7(d).

Simply put, the current process permits the NRC to impose penalties when managers legitimately exercise judgment and hold employees accountable. There can be no question that this approach in turn interferes with licensee efforts to achieve good plant performance and maintain safety. We are disappointed that the Task Group's draft report does not suggest any significant improvements to the NRC's approach to evaluating alleged discrimination cases.

Process Improvements Are Needed

The report fails to propose meaningful changes in the methods for investigating and reviewing discrimination allegations. In our view, the NRC should modify its processes so that discrimination allegations will normally be referred to licensees unless there is a clear basis to conclude that there is a systematic or pervasive environment of discrimination (e.g., as evidenced by repetitive discrimination findings) or that the licensee will not handle the allegation effectively. Adopting this suggestion would not only be consistent with industry performance trends, but would also reserve costly investigation resources for the rare occasions that meet the above exceptions. To the extent the NRC remains involved in a specific discrimination allegation, the process should be made more transparent by routinely providing the licensee with a copy of the NRC Office of Investigations (OI) investigation report prior to a predecisional enforcement conference. More generally, the level of information provided to a licensee prior to the predecisional enforcement conference should be at least commensurate with that provided when the potential violation involves a technical issue; at a minimum, the basic facts supporting each element of a discrimination claim and the inferences being drawn should be disclosed. This approach will not only assure that the predecisional enforcement conference focuses on the critical issues, but we would expect that the discipline imposed by this approach will lead to speedier resolution of the claim.

The NRC's investigative processes could be improved by incorporating some of the features of the process used by the Department of Labor (DOL) for investigating Section 211 complaints. The DOL process generally recognizes that most claims in this area involve delicate issues of employer-employee relations. As a result, one aspect of the DOL process is to attempt to reconcile the parties and mediate a mutually acceptable resolution. In contrast, the NRC process has become strictly enforcement oriented. In fact, the Task Group recommends that

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the current Enforcement Policy be revised to eliminate credit for settlements. We would consider such a change to be a regressive policy shift. The NRC's approach, like the DOL's, should be geared towards reducing tensions in the workplace and facilitating the prompt and amicable resolution of complaints.

Similar to the DOL process, the NRC process should also allow licensees an opportunity to investigate discrimination allegations and submit position statements on the issues before any enforcement action is proposed. Moreover, to help ensure that the licensee has a fair opportunity to present all the relevant facts and address any inferences or conclusions being drawn by the NRC, we support the Task Group's recommendation that the NRC release a redacted version of the OI investigation report to the licensee

Finally, the draft report recommends that licensees be denied a predecisional enforcement conference prior to the issuance of a Notice of Violation. We consider that to be a step in the wrong direction. As it stands, licensees are only able to obtain an administrative review process after enforcement action is taken, and this process is too cumbersome, too burdensome, and too late. In addition, in contrast to the recommendation of the Task Group, even this unsatisfactory process is not available to individuals who are issued a Notice of Violation with a hearing opportunity. Due process demands at least this protection, as even the NRC's own case law recognizes the impact on an individual's liberty interest from NRC action. *Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1)*, CLI-85-2, 21 N.R.C. 282, 316 (1985) ("A person's liberty interest is implicated '[w]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him.>"). In our view, a more open, administrative process — available to both individuals and licensees accused of discrimination — will lead to better reasoned, and more credibly justified enforcement decisions in the discrimination context.

For these reasons, EGC urges the Task Group and the NRC to take a fresh look at the discrimination investigation and enforcement process with an eye toward restoring the regulatory balance and making the NRC's approach less prosecutorial. The process should not encourage enforcement action based on evidence that might be sufficient to sustain a violation if the NRC was pressed at a hearing to defend itself, but rather to assure fair and independent NRC review of discrimination findings.

Thank you for your attention to these important concerns. If you have any questions about this letter, please contact me or K. A. Ainger at (630) 657-2800.

Respectfully,



J. A. Benjamin
Vice President
Licensing and Regulatory Affairs