UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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BRIEFING ON POLICY OPTIONS FOR REVISING NRC'S PROCESS FOR HANDLING DISCRIMINATION ISSUES

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Nuclear Regulatory Commission

One White Flint North

Rockville, Maryland

Tuesday

December 17, 2002

The Commission met in open session, pursuant to notice.

RICHARD A. MESERVE, Chairman of the

Commission, presiding.

COMMISSIONERS PRESENT:

GRETA J. DICUS, Member of the Commission

NILS J. DIAZ, Member of the Commission

EDWARD MCGAFFIGAN, JR., Member of the Commission

JEFFREY MERRIFIELD, Member of the Commission

(The following transcript was produced from electronic caption media and audio and video media provided by the Nuclear Regulatory Commission.)

STAFF AND PRESENTERS SEATED AT THE COMMISSION TABLE:

<PANEL ONE>

Secretary

General Counsel

Mr. Samuel Collins, Director, NRR

Mr. Frank Congel, Director, OE

Mr. William Kane, Deputy, EDO

Ms. Cynthia Pederson, Director, Division of Reactor Safety, Region III

Dr. William Travers, EDO

<PANEL TWO>

Mr. Ralph Beedle, NEI

Ms. Billie Pirner Garde, Clifford, Lyons & Garde

Mr. David Lochbaum, Union of Concerned Scientists

P-R-O-C-E-E-D-I-N-G-S

CHAIRMAN RICHARD MESERVE: Good morning. We're here this morning to have a briefing on policy options and recommendations for revising the NRC's process for handling discrimination issues. I think everyone in the room appreciates that one of the central objectives for the Commission is to ensure safe operations for nuclear plants.

And I think we'll all also agree that it is essential in achieving that objective that workers be free from harassment, intimidation, retaliation, or discrimination, for racing safety concerns. There is controversy, however, for how best to achieve that objective.

The Commission has benefited from input from the staff, both from a Discrimination Task Group Report and from the efforts from a Senior Management Review Team which have somewhat different recommendations for us as to how we might best proceed. The Commission has made both of these reports public. We're having this meeting today in order to benefit from a briefing from the staff with regard to these matters and also to have

a briefing from several stakeholders who will be advising us in a second panel. So we very much look forward to the briefings this morning on what is a very important subject for the agency.

With that, Dr. Travers, you may proceed.

WILLIAM TRAVERS: Thank you. Good morning, Mr. Chairman and Commissioners.

As you've indicated, the staff is here today to brief the Commission on the policy options and recommendations presented in SECY-02-0166 related to the NRC's process for handling discrimination issues. The policy options presented in the SECY paper were based on the work conducted by the Discrimination Task Force and the associated Senior Management Review Team.

As you are aware, the Discrimination Task Group was assembled in April of 2000 to evaluate the agency's process for handling matters concerning our employee protection standards and to propose recommendations for improving that process.

The Task Group was also chartered to ensure that the application of NRC's enforcement process is consistent with objective of providing an environment

where workers are free to raise safety concerns without fear of retaliation.

To help ensure involvement of internal and external stakeholders in the development of its recommendations, the Task Group conducted several public meetings at various locations across the nation.

The Task Group issued a draft report in April of 2001 and issued its final report in April of 2002 in which it presented a series of basic policy questions for consideration and associated recommendations to address stakeholder concerns.

Because of the controversial nature of this area, I established a senior management team to build on the Task Group's final recommendations by providing additional perspectives to enhance the potential options for Commission consideration.

This morning Bill Kane, my deputy, and Dr. Frank Congel, the Director of the Office of Enforcement, will be discussing in more detail the rationales behind the conclusions reached by the Senior Management Review Team and the Discrimination Task Force, respectively. Also at the table with us this

morning is Sam Collins, the Director of the Office of Nuclear Reactor Regulation, and Cynthia Pederson, the Director of the Division of Reactor Safety in Region III.

Thank you very much. With that I'll turn to Frank.

FRANK CONGEL: Thank you, Bill.

Good morning, Chairman, Commissioners. I would first like to point out that my Task Group is here this morning as well sitting behind. In an attempt to answer any questions later on, we have a full group here. Cindy, of course, has been a member of the group from it's formation, and she is here at the table with me as well.

Just a quick review, the group was formed, as Dr. Travers said, in April of 2000. And the intent was to have a clear documentation of the current process that we follow for handling discrimination cases. We're also chartered with identifying potential improvements in the process and to interact extensively with both internal and external stakeholders. Looking forward to having recommendations for revisions to both enforcement

policy as well as other procedural areas for improvement, and to have, ultimately, a Commission paper which would outline these.

Could I have the first slide, please? Wrong speaker -- okay.

Okay I'll just continue. We'll see if we get them on. In any case, the Task Group initially conducted a series of meetings following the chartering of the group. And all of our four regional offices held meetings with the staff here at headquarters and conducted public meetings at the six locations across the country, Waterford, Connecticut and San Louis Obispo, California.

The intent of those meetings was to solicit perspectives for consideration when the original group was going to establish its draft report. The draft report was issued in April of 2001. I would like to point out that it was within that time frame that Bill Borchardt went on to a position with NRR and I assumed the directorship of the Office of Enforcement. I was the only person who was changed on the Task Force. But the development from the draft report to the final report was done with my being in that position.

We went to the same locations that were visited during the preliminary public meetings. As a result of issuing the draft report, we were interested in getting comments on the perspectives and positions that were represented in the draft report.

As a result of those meetings, a final report was prepared. And in April of this year, we issued the final report.

I believe it's important to summarize what we got as comments. And what I intend to do is divide the comments into three categories to give the Commission a flavor of just what we had encountered. I would also like to point out that the comments and perspectives that were represented in the second round of meetings were very similar to the ones that were represented initially.

The common comments on the issue of handling discrimination cases were the following. One of the principle ones, one of the foremost, was to improve the timeliness of our process. Our process can occupy a considerable clock time. And in some cases, when we have interactions and overlap with the Department of

Labor, it can extend even to years. Clearly, it's a concern to all parties concerned and was brought up rather frequently.

Another request was to release more information prior to having a predecisional enforcement conference. We had a number of commenters pointing out that the staff had information available to us that was only learned when the parties got together at the PEC. There were comments regarding the conduct of the OI investigations. A number of the commenters pointed out that the OI investigations can be intimidating, they can be difficult to deal with, it didn't make much difference whether you were an individual providing information, if it was presumably associated with identifying the safety aspect, or if you were an individual potentially involved with an allegement. There was a request for more information in determining what the severity level of the infraction may be. And there was information that was solicited regarding just how we interact with the Department of Labor, just what is the interface between us.

Comments that were attributed to members of

the public, just to do a quick summary, ranged from the allegers stating that they need more protection or more assistance in dealing with the role as being an alleger. And this is both in terms of the protection in dealing with their employer as well as what they considered personal protection. There is financial assistance that was indicated that could be used, particularly if there were meetings being held at one of our regional offices, it would present a monetary hardship for the alleger to travel to participate in enforcement conferences.

There were recommendations for stronger enforcement actions when discrimination was identified. There was a statement that our regulations, the regulations that are currently in place, are sufficient to do the job, it's just the manner in which we should carry them out.

There was a suggestion to not defer much to the Department of Labor, that the NRC has a perspective that's different than the Department of Labor and provides assistance they couldn't get otherwise. There was also a statement made that, if you look of our

statistics, approximately 10% or less of initial allegations that get into our process actually go to the end point and we find that, by virtue of investigation, that they're substantiated. And even the suggestion to looking at data as to how a particular licensee performs may want to look at other potential infraction by licensees outside of our area, but within the perview, for example, of OSHA because they could possibly provide some insight to the performance of the licensee.

Industry comments are that the draft report didn't sufficiently address the comments that were made during the preliminary phase, that the recommendation was defer all except the most egregious personnel actions to the Department of Labor. They didn't believe that it was appropriate to get involved with individual actions, that there was overlap, dual regulation, between the NRC and the Department of Labor. And the recommendation to both focus on the safety conscious work environment without any need for additional regulations, and, where possible, to risk inform the process.

I'm going to quickly go over our evaluation of what we consider the basic policy questions. Because we receive such a wide range of very strongly made suggestions and comments, and since many of them were mutually exclusive, we thought it may be appropriate to provide for the agency some basic policy questions for consideration to see if there is a time or an opportunity for us to re-examine the role. And this is an expansion that was above and beyond our original charter, but we felt it was important to point out to the EDO and the Commission because there were such wide ranging comments.

The formulation of our policy question started with the biggest picture, one namely, should we stay in the business, should we continue our role of dealing with discrimination matters at the personal level. This agency is unique in dealing with that level of detail in individual allegers. Though it has a long standing tradition that has started over twenty-five years ago and is part of our basic regulatory philosophy that, since we can't inspect and be in our facilities at all times, that all participants, employees, managers and so on can be eyes

and ears to oversee our inspection and oversight process. That was expressed in early to mid 70's and has been followed ever since. So any change at this big level would be very fundamental.

We went down the chain, the logic chain, to see how we can make basic decisions like answers to questions that would ultimately determine where we would end up. The next level would be, should we base our enforcement actions on individual cases of discrimination or should we, as was mentioned by some commenters, focus on the safety conscious work environment.

And that formulation -- and I want to just spend a minute with this because this is the principle point that the Senior Management Review Team addressed, is that in our formulation of the Discrimination Task Group Report, we pointed out, either go with a safety conscious work environment rule or a process and do away with our 50.7 and associated discrimination regulations, or stay with our discrimination regulations which would bring us further down the chain. It's a little bit different because, as you'll hear from Bill Kane, the

process he has is what is considered an amalgam of the two.

But our decision point, as expressed in our report, is that we go with evaluating the safety conscious work environment with or without a rule. There are pros and cons to each, as they are discussed. Or we continue another decision point as to whether we would look at individual cases.

In looking at individual cases, we have an option of either -- depending upon DOL, the Department of Labor, or we can do the investigations ourselves. With DOL as a basis, we would be totally dependent on dealing with individual harassment or discrimination cases on the outcome of the DOL process. The other, proceeding down the logic chain, would be ours. Continue with the current process is obvious. And the last one is actually the essence of our task, and that was streamline the current process. We have several subparts to that. The most significant one, which is indicated on my slide, is to whether we should have a risk assessment associated with the delegation itself. I guess we never got caught up with the slides.

The DTG came up with a series of recommendations. The recommendations were all associated with some basic changes, associated really with the current process. It's important to point out that no single proposal would address all of the concerns. I'm trying to give a perspective that they were wide ranging. But we came up with some suggestions that we feel is one way in which the issues can be addressed. Some of them, to reduce the number of OI investigations, would be to raise the threshold for the OI referrals. There are some other details here, because I'm running a little bit later than I wanted to. But in any case, there are improvements we could make in handling the overall process, for example, resequencing the enforcement conference sooner in the process. And the ideal case is with another recommendation subsequent to this, to provide as much information as we receive from the OI investigation up front so that parties involved are familiar with what the extent of the case is and the details of the case.

That was an issue that was brought up particularly with the allegers. The licensees usually

follow their own process and they're able to get information independent of us, individual allegers are usually not in a position to get that by releasing information generated by the investigation. We have more of a parody with the parties involved.

Eliminate DOL referral. That would go entirely on our own, and any DOL process that would take place would be taking place separately and distinct from us. If, in the unlikely but possible circumstance that at some point down the road, the Department of Labor came to a different conclusion then us, we could always use information that they may have that we didn't have at some other point. But in terms of improving the timeliness, it's clear that we would have to get this information. And our process started more quickly and earlier.

Evaluate the use of the alternate dispute resolution process. That is currently a task in my office. And we will be providing to the Commission, in a short time, recommendations for a pilot to proceed along to evaluate the usefulness of the alternate dispute resolution process.

We felt there were some place, particularly

early on in the process, where ADR may be useful for both the alleger as well as the licensee. There are other places within the process where it can be used. There can be many details furnished. But it shows some promise.

We had used a similar mediation process with the agency in dealing with licensees and coming up with matters of solving some alleged infractions in the recent past. So the process shows some promise that can be applied. As I said, there are more details to come.

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The release of details associated with the OI report, I already mentioned.

It's a difficult recommendation, as are most of these, because they have implications about their confidentiality, privacy. But there are manners in which the Task Group felt that information could be provided that would be helpful to the process.

Of course, our ultimate goal is to determine what actually has happened or is happening at one of our licensees and get that to a status or a position where we believe that safety issues are at their most

efficient point.

We support rule making to allow issue of civil penalties to contractors. There have been several cases, even in my relatively short tenure, with OE where a contractor has had infractions at multiple licensee sites in dealing with contractors. Currently, we only hold our licensee responsible. So even if one contractor has multiple infractions with various licensee, we believe that the cause should be addressed directly, and that would be one way.

As I also mentioned earlier, that the issues associated with the OI investigative techniques, the number of concerns expressed, our Office of Investigations follows standard protocols, our federal law officers. However, we recommend that this be an internal self assessment by OI to see if there are other ways in which they can carry out their function and perhaps respond to this concern.

Overall, the Discrimination Task Group felt that the process that we have in place right now can use, in some cases, significant reform and change to improve the manner in which we carry out our tasks and

improve our efficiency and effectiveness. But the system that's in place now can be fixed or remedied. That does not say that there aren't other ways in which we can deal with this very important issue. And I look forward to providing any other information or insights we may have to assist in furthering this issue along. With that, I'll turn it over to Bill Kane.

WILLIAM KANE: Could we get Slide Nine.

<SLIDE NUMBER NINE>

Good morning, Mr. Chairman, Commissioners. As Dr. Travers indicated, a senior management team was assembled to review the final report and provide any additional perspectives that could enhance the options for Commission consideration, I lead that team. It also included Dr. Paperiello, also a deputy to Dr. Travers, Sam Collins, director of NRR, Marty Virgilio, Director of NMSS, and Louis Reyes, Regional Administrator of Region II. We're also ably assisted by Larry Chandler from OGC.

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In arriving at its conclusion, the SMRT, as

we're called, Senior Management Review Team, considered the Task Group findings and recommendations, the NRC's strategic performance goals, the Commission's broad direction for NRC programs to evolve into a more risk informed and performance based framework the Commission's policy for clarity and predicability in its regulatory programs, and stakeholder comments, as well as licensees experienced with implementing employee concerns programs. The evaluation that we conducted relied heavily on the decision making logic put forward by the Task Group.

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What we arrived at was an overall conclusion that we should be moving to a rule that would incorporate key elements of the current NRC employee protection provisions. And that is recommended for the longer term. However, what we also believed was that there were certain interim measures that should be -- sense rule making would necessarily involve some period of time, that we would have to incorporate some interim measures that would allow us to transition forward into

a fully functional safety conscious work environment rule.

As part of that evaluation, we looked at what the Discrimination Task Group had recommended in terms of major cross cutting issues, common option attributes as discussed, and additional comments and changes. And with minor exceptions, we believe that those recommendations can be incorporated in the interim.

But the rule is seen, primarily, as a framework for addressing potential safety concerns nearest to where licensed activities occur, and reinforcing the responsibility that safe operation of the facility rests with the licensee. We also considered that using the enforcement process to address discrimination complaints, as is currently done, as a vehicle of change to encourage a safety conscious work environment, results in the NRC bearing the responsibility for a very resource intensive programmatic framework for administering discrimination complaints.

As a result, we asked ourselves a broader question in examining policy; how should NRC approach regulation in this area, including the handling of

discrimination complaints, the agency's goals, and the licensee's role and responsibility in assuring a proper environment. And we concluded after deliberation that the best approach for encompassing these goals was rule making.

We also noted that -- or recognized, that the commission had previously considered safety conscious environment rule making. And we recognize also that several factors have changed since that decision, which we thought merited reconsideration of this approach. These factors included the implementation of the reactor oversight program, further experience with licensees, initiating employee's concerns, program efforts, and development of international activities in this area, and the agencies' strategic goals.

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The vision that we had for this system is one in which licensees would implement strong programs, NRC would inspect, and any residual discrimination complaints would be handled by the DOL process. This approach would bring the nuclear industry under closer

alignment with how discrimination complaints are handled in other industries and would reduce the perception of dual regulation in this area. Nonetheless, the agency's regulation in the area would continue to be unique in that it would address safety conscious work environment by rule.

NRC's role would evolve into focusing on the effectiveness of the licensee's program as a way to proactively assure discrimination complaints are handled properly. This is consistent with the licensee's primary responsibility to protect public health and safety, and with the NRC's overall regulatory approach.

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<SLIDE NUMBER 13>

We envision that the rule making would be graduated, in other words as the smaller materials licensee programs would have less extensive programs than the larger licensees. That would be one of the attributes of the rule.

Other things that we considered as extremely important are employee and supervisor training and communications. These are essential components, we believe, of making this process work.

Performance measurement and indicators, I think, are important to evaluate, and to monitor system health, and trigger appropriate follow up actions.

Licensees would follow up for all discrimination cases. We would propose to identify and establish a threshold for NRC investigation, and of course, to inspect the licensee's safety conscious work environment programs, which would provide an earlier opportunity, we believe, to identify improper trends.

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We developed four options for Commission consideration. Option one is to eliminate NRC employee protection regulations and discontinue review and assessment of safety conscious work environment.

Option Two would be to revise the investigative thresholds for the Office of Investigation, which is one of the Discrimination Task Group recommendations.

Option Three is what the Senior Management Review Team proposes, which is rule making for a safety conscious work environment with an interim transitional

program to improve effectiveness and efficiency.

And option four is to continue with the current program and adopt recommendations for streamlining, as addressed in Discrimination Task Group option 5-A.

However, as I said before, we came down on the side of Option Three. And we believe that licensee's employment of such programs will promote earlier identification of discrimination issues, enhance early resolution of complaints to assure that safety is maintained.

By establishing a threshold based on the severity level of the complaints, we believe that the number of discrimination cases forwarded to NRC for investigation would be reduced, making the handling of discrimination complaints more effective in efficiency.

The NRC will not be eliminating employment protection requirements from its regulations. The rule would provide a graded approach for implementing these programs, and as a result, we believe that this should maintain public confidence in the NRC, in that we will still be addressing employment protection cases.

The rule may be viewed by the industry as an unnecessary burden, however, the current program places a significant investigative and enforcement burden on the NRC. The proposed rule will shift the burden, we believe, to the license community in the context of the rule. The work environment will be monitored and enhanced more effectively through our oversight before concerns arise, whether than try to achieve a similar goal through individual enforcement actions after discrimination complaints surface.

NRC has traditionally viewed whistle-blower protection as a safety concern, which is a necessary burden. The ultimate responsibility for safety, of course, at a facility, is with the licensee. And by shifting the burden of employee protection to a licensee's program provides a proper alignment with the licensee's principle responsibility for safe operation and with our regulatory approach.

I'll turn it over now to Bill.

WILLIAM TRAVERS: Mr. Chairman, that concludes the staff's presentation this morning.

CHAIRMAN RICHARD MESERVE: Thank you for a

helpful briefing of, what, as I know, has been a very extensive effort by the staff over a few years to try to distill and deal with a very complicated subject.

I believe it's Commissioner McGaffigan's turn to go first.

COMMISSIONER EDWARD MCGAFFIGAN: Thank you, Mr. Chairman.

I might just start by saying that I'm sort of like Mr. Lochbaum on the safety conscious work environment rule. I didn't support it in '97. I don't support it in 2002. And I suspect I won't support it in the future. Can you tell me what would be, what the text of a safety conscious work environment rule would be?

I mean, the Task Group correctly rejected it on the grounds that they didn't have a clue how to draft it. You guys really don't tell me how you're going to draft it. You just say you would like to do it.

What are the elements of a couple sentences in this rule?

WILLIAM KANE: The rule would -- if you go back to -- if I can go back and repeat what I said

earlier, the elements of the rule would require that they put into place an employee concerns program.

That program would also include, as part of it, the requirement to conduct training of employees and supervisors, as well as communications on an on-going basis --

COMMISSIONER EDWARD MCGAFFIGAN: It sounds like it's all process, Bill. it sounds like you'll have an employee concerns program, which may be, you know, it's one size fits all, maybe you need it in some places. It's all process.

What does this prevent? I mean, you know, if you look at Davis-Besse, there's nothing that this would prevent there. If you look at Point Beach, there's nothing this would prevent there. If you look at Cooper, there's nothing. I mean, I'm thinking about column four or whatever plants. There's nothing this would prevent there.

What is this going to accomplish?

WILLIAM KANE: I think from the Team's perspective, it puts the emphasis back on the front end of the process, as opposed to the back end of the

process. So that if you put programs in place, and train supervisors and managers, communicate expectations at the front end and inspect, as we would do, the front end of the process, we believe that that would, if it's effective, would in fact go a long way to eliminate the discrimination.

COMMISSIONER EDWARD MCGAFFIGAN: In the case of Millstone, we were not all that sure we knew how to inspect safety conscious work environments, so we brought in an outside contractor, Little Harbor, to help us in that area. Then we came along after Little Harbor and agreed with them. But we don't have a lot of expertise as to how one should run an employee concerns program. It isn't clear to me that you will learn anything through the inspection process as to whether someone's running it effectively or not.

You know, our history -- I mean, our inspectors can be technical types. A lot of the issues involved in employee concerns tend to be soft issues. Are we capable of inspecting -- are we going to have -- under your vision. It's not mine, but under you vision, are we going to have a global Little Harbor who's going

to come in and help us on the inspections of all of these employee concerns programs that we're going to create and all of these licensees?

WILLIAM TRAVERS: At the outset, I would say this is a close call in my mind as well. But you've asked a good question. And that is, our there instances where we can envision something like this actually having avoided a problem. And if you use Millstone, I happen to think, in the case of Millstone -- Billie Garde has a comment on this later -- that having in place the sort of program that they ultimately put in place by virtue of the order that we're on, might have effectively avoided the widespread problem that existed at Millstone. I mean, we stepped in with the actions that the Commission took in both the safety realm and the safety conscious work environment realm.

Is that sufficient basis for going forward with rule making? I don't know. Maybe it is.

But I think the thinking in our part was, the reactive mode that we, from time to time, find ourselves in has been one that many have found unsatisfying. Stakeholders, members of the Commission at times. And

we were looking for some sort of solution to this reactive position that we find ourselves in. And recognizing the subjective nature of this makes it a close call.

But it is one where we do have some experience in evaluating a safety conscious work environment. We actually have an inspection module. We've employed that in inspections at Millstone and other places with pretty good affect.

Are we necessarily experts in this area? No. But we are experts in sort of rooting around in an organization and getting a sense of how programs are working and whether or not they're working well in the view of the majority of employees.

COMMISSIONER EDWARD MCGAFFIGAN: Let me ask Frank Congel, on the issue of ADR and where to use ADR, you suggest we use ADR early in the process. You'll hear people on the second panel talking about using ADR, if all people agree, in lieu of an OI investigation early in the process. Are you pretty close to that perspective, your group?

FRANK CONGEL: Yes. Actually, as I mentioned,

we’re also in the process of completing a paper that will go out to recommend a pilot for ADR to evaluate just where the best places or where you can get most effectiveness from it.

One place that the Task Group was able to look at, and there was a consensus on, was early on in the process when an alleger comes to the NRC, depending upon the significance, at least based on the manner in which it’s represented or articulated, there are cases where there could be referral back to the licensee with the alleger as a whistle blower and an ADR process worked out so that the significance of that may not be as much as what was brought forward.

And a process whereby the parties involved would be brought together so that we could further explore it could lend an alternative way to handle something that will otherwise go through our complete process with a full investigation and so on.

As you know, we get approximately, just on an average, about 150 allegations a year. And about three fourths of them or so are referred to OI for an investigation. And only 5 to 10% turn out to be

substantiated. If there is a way in which we can short circuit this and find out those that will not end up to be substantiated, but clearly that represent a concern that there's an alternative way to get to that, that's where ADR would fit in.

COMMISSIONER EDWARD MCGAFFIGAN: How does that decision get made? You get an allegation of discrimination from licensee X or employee of licensee X. Do you approach that employee and say, there is an alternate dispute resolution pathway at this point, would you like us to try to exercise that?

Do you have to consent to it? Or how is the decision made to forgo the OI investigation, at least initially?

FRANK CONGEL: We haven't developed a process. But first of all, right now an allegations review panel looks at the information presented. If there isn't enough information for them to render a decision, there could be communication with the alleger.

At that point, depending upon what criteria are established -- which I said we haven't done, we haven't finalized -- that there may be opportunities to

make suggestions to the alleger that there may be another way in which we could approach this if the panel would be satisfied that it isn't something that, you know, of major significance that clearly would deserve and warrant the full impact of our evaluation.

But that entry point appears to be the most potentially fruitful right now.

COMMISSIONER EDWARD MCGAFFIGAN: And as part of this deal to try ADR, presumably, the alleger would also, at least initially, forgo the DOL process or just not actively pursue the DOL process?

FRANK CONGEL: Well, the way I envision it, that would be entirely up to the individual. As it is now, only about 40% of the people who come to us also go to DOL. But what I would envision is that it would be completely free and open for the individual to make that choice. We would certainly provide any information we could. But no, I wouldn't -- I don't envision any influence on our part as to whether the individual would do that or not.

COMMISSIONER EDWARD MCGAFFIGAN: But you're bringing in a third-party for the ADR, the licensee.

For a licensee to be interested in ADR, they presumably would at least want the DOL, like the OI investigation, held in abeyance while the ADR is pursued.

FRANK CONGEL: I understand.

COMMISSIONER EDWARD MCGAFFIGAN: I'm just trying to figure out whether or not this would work. This is a complicated decision you have to make up front in the process with a bunch of parties. And I just, you know, I guess we could try it some. But it's -- there's a lot of people who have to say yes to ADR in a lot of conditions that have to be met for that to work early in the process.

And I'm just trying to get a sense as to whether -- maybe with the second panel I'll pursue that.

I have other questions, Mr. Chairman, but I think I've used enough time.

CHAIRMAN RICHARD MESERVE: Commissioner Merrifield?

COMMISSIONER JEFFREY MERRIFIELD: Thank you, Mr. Chairman. I'm going to follow through on some things that Commissioner McGaffigan has already started. I won't be perhaps as directed as he in my views on a

rule.

I will say, however, that coming to this I feel somewhat like Goldilocks. I find neither the recommendation of a rule or the Discrimination Task Force quite hits the mark, neither is quite in the right place.

Mr. Congel, I do want to follow up on the issue of ADR.

As you know, ADR is an issue that, during the time I've been here as a Commissioner I've been a strong component of. And we have talked directly about my belief that this would be a good tool for resolving some of the concerns out there. You mentioned some of the statistics about the number of allegations that are brought, those that are investigated, and those that ultimately result in finding out that the allegation is in fact substantiated. And those are quite despaired. If you look at the statistics -- and these were incorporated both in the draft report as well as the final report -- we did have a jump.

After having gone through Millstone, we had a jump in the number of allegations that we investigated.

However, there was not a proportionate, or in fact at all, statistically significant increase in the number that we've substantiated. So we've investigated a lot more but we weren't finding a lot more.

In the discussions I've had with various stakeholders, individuals who've raised allegations, individuals who represent allegers, individuals who represent utilities, the utilities, other interested stakeholders, it seems to me that in some proportion -- you would have a better sense of this then I would -- that some proportion of these allegations ultimately result from miscommunications; that in many cases a line manager and an employee of a utility have a disagreement, they get locked into positions, we come flying in with our criminal investigators, everyone hears the word criminal and the attorneys get involved and it all sort of escalates into wherever it ultimately goes.

The one thing I've found, from everyone involved in these cases, is a distaste for the process. No one enjoys going through the process whatsoever. And many individuals who I've talked to, either the allegers

or the individuals for whom allegations have been levied against believes it's one of the most tasteful things they've had to go through in their career. So anything that we can do, it seem to me, to minimize the number of people who have to go through that, is probably a good thing.

But getting us back to ADR, have some of your initial reviews of this lead you to believe that that kind of allegation, those that result not necessarily from a technical issue, which is principally what we're concerned about, but in a difference of opinion or perhaps an inarticulate way two individuals talk to each other in the nature of a work force environment, escalates into an actual -- where we have to commit substantial resources to respond.

Is ADR going to be helpful in those instances, do you think?

FRANK CONGEL: First of all, let me point out that in March of this year we held a public meeting where the possible use of ADR was discussed across our whole enforcement process.

The overwhelming majority of commenters talked

about ADR as a potentially very useful tool for the discrimination process. And in fact the paper that we're preparing right now, and ultimately will present, is focused on that very issue. I think, certainly for the first round, that looks like the place where we may bear the most fruit.

Secondly, indeed, your characterization of it being an unpleasant process, regardless of the side that you're on, management, licensee, alleger, so on, it is not particularly pleasant. If there are ways in which we can get involved with whatever the basis is for the alleger coming forward early on to see if we can sort through what the true basic issues are, the better it would be. And that's what we're hoping that early entry into ADR would accomplish.

I have to add though that we are dealing with an environment here where everything may not be up-front and obvious when it first comes forward. An individual who comes to us may have already exhausted, in his or her mind, the internal process, and is frustrated. It may be a miscommunication. It might be something very important. There may be a feeling, by the individual

that there's a problem that permeates. And we wouldn't want to have any of our actions, in such a way, put that individual back in harm's way.

It's a very delicate balance, but clearly there are many cases that, as pointed out when we do the OI investigations, we're not sure that there has been discrimination. If there's a way that you can get in the process first, we solve it, come to a conclusion, and hopefully improve the overall environment, that would be fine. Any way in which we could save resources without losing those significant cases is what we would be seeking.

COMMISSIONER JEFFREY MERRIFIELD: I think that's an important point. As we try to reform the system, we have to be mindful, even though only a small percentage of these are found to be valid, some are very important. And Millstone obviously being the most significant example of that. So it is an important of our overall process.

WILLIAM KANE: But I think it is important, as Frank said, that this process, if it's used, has to start early. And I think that's one of the things we're

trying to do, is to get these resolutions back to an earlier point in time of the process.

COMMISSIONER JEFFREY MERRIFIELD: A clarification. And I don't -- because sometimes we get confused about these things. The issues at Millstone were, the issues we confronted at Millstone clearly involved a safety conscious work environment. And I don't mean to quibble the characterizations. But the issues that Commissioner McGaffigan referred to at Davis-Besse and at Cooper, obviously the jury is still somewhat out on those. But were those not more characterized as safety culture issues whether than safety conscious work environment?

I'm not aware of a host of allegations coming in relative to those plants, so I just wanted to clarify that.

WILLIAM KANE: I think it's a combination of both as I recall. I would have to go back and get the details. But I believe that there were issues at both of those facilities that could be considered to be safety conscious work environment, but I would have to go back and look at that.

COMMISSIONER JEFFREY MERRIFIELD: If the staff would clarify. Because at least in terms of what I've been reading so far, and I'm thinking notably of Davis-Besse, it was more of an issue of safety culture there rather than the fact that those issues had not -- individuals had raised those issues.

WILLIAM KANE: There were problems that were identified in the lessons learned task force report. I can get you a specific reference.

COMMISSIONER JEFFREY MERRIFIELD: The important point is that you know, obviously those are two terms that mean different things, and we just need to be careful about how we use them.

WILLIAM KANE: And we certainly agree that this is only a subset of safety culture.

COMMISSIONER JEFFREY MERRIFIELD: Back in 1996 the Commission had its policy statement on the freedom of employees in a nuclear industry to raise safety concerns without fear of retaliation. That contains what we believe in '96 were the appropriate attributes for an effective safety conscious work environment program. And that came about in part as a result of

work we had underway at the time at Millstone.

And I want to direct to Bill Kane, if we have that policy statement -- and I had a chance to read it over again last night and it's a very well articulated document. I had some stakeholders suggest to me that that provides us a tool, combined with our inspection capabilities, to go out and do, principally, what we need to do.

And the question that others have raised to me is, given that, why do we need a rule to be proactive in our programs? We already have an established policy statement. Why can't we use that as a tool to go out and deal with these issues.

WILLIAM KANE: Well, we have that now. I think our view was that this is such a fundamental aspect of what a licensee's responsibility should be, is that it should be based on a rule as opposed to a policy.

COMMISSIONER JEFFREY MERRIFIELD: So you're basically saying that that policy statement, combined with our inspection capabilities, isn't sufficient for us to do what we need to do?

WILLIAM KANE: I think we need to -- yes, I would answer that yes. I think we need to do more.

SAMUEL COLLINS: I believe, Commissioner, the Management Team's view was that the attributes are there but the definition of responsibilities is not necessarily clear. The Senior Management Group would want to shift their responsibility and accountability to the front end of the process, as Bill indicated, by rule, have the licensees responsible and accountable for many of the attributes that have been discussed here today, including ADR perhaps, and that our views would be more confirmatory.

What we do now with the inspection procedure is take a sampling on an inspection that's done on a biannual basis. We also have the tool where we have the status of the allegation program. And in 2001 Cooper did hit the threshold. We did review Cooper and find out that no further actions were necessary. But we have reviewed some plants, based on the threshhold criteria of two times the norm or 50%, or three times the norm, that have resulted in the agency taking strong action, including the current order at South Texas.

So our goal is not to lose any of the attributes of the confirmatory sense or the second check, but to shift the burden to the responsibility and accountability of the licensee, using many of the attributes of the policy as well as the review groups.

COMMISSIONER JEFFREY MERRIFIELD: Last question, I want to go over quickly. During our consultations with Little Harbor related to Millstone, they did develop a series of performance indicators for Millstone's safety conscious work environment program that were consistent with that policy statement. The SMRT has recommended that we also develop performance indicators. And I'm wondering whether it is necessary for us to have a rule to establish performance indicators, or can they be based on policy?

WILLIAM CANE: Clearly, that aspect can be handled either way. I think as to the requirement to have performance indicators, we would envision that that be part of rule as to what those indicators were. I think that's something that we can deal with on a policy statement.

COMMISSIONER JEFFREY MERRIFIELD: But if you

want to have performance indicators, you would not be precluded from doing so because you did not have a rule, is what you're saying?

WILLIAM KANE: I think they would be part of the attributes that we would have in a specific rule, the fact that we would expect that licensees have performance indicators.

WILLIAM TRAVERS: And that's one option. I think you're correct. I think we could, in another fashion, we would have to get agreement with the industry because absent a rule that would require sort of a consensus view that performance indicator data of that sort was appropriate, that they would develop it, that they would report it, and that we would use it in a program such as the ROP, Reactor Oversight Process. But you're quite correct. You could do it.

SAMUEL COLLINS: Commissioner, I think it's important to note that if we're talking about performance indicators and thresholds, we're really talking about the ROP program. And part of the purpose of the ROP Program is to provide the clear expectations for the agency to be able to be consistent in our review

and be predictable and to develop that with our stakeholders.

Just having a set of performance indicators, which really forces the process from the back end of what you measure, without the front end of that process being articulated, either by rule making or by some other means where the expectations are clear, perhaps even with the stakeholder of the industry defining the attributes of the process, would be perhaps not an inefficient way to do it. So I think it's a combination of both of those.

COMMISSIONER JEFFREY MERRIFIELD: Well, I agree that you have to sort of balance these things so that you're not just laying sort of performance indicators on a system and declaring victory. We clearly require more than that. As you can tell, I don't necessarily agree that we need a rule in order to effectuate that.

Thank you, Mr. Chairman.

CHAIRMAN RICHARD MESERVE: I have just a quick question at the outset that, just a point of clarification. The Senior Management Review Team

presented us with four options. Option Two was to raise the threshold for investigation. Option Four was a series of streamlining measures. I would not have understood those to be mutually exclusive, and I think in the Discrimination Task Force Report they were not. Is the thought from the Senior Management Review Team that you've got to go one way or the other?

WILLIAM KANE: Not really. I'll agree, it is a little confusing because the Task Group did affectively recommend Option Two and that part of Option Four which talked about the cross cutting and additional attributes.

The way we phrased Option Four was that we would stay with the current process but only use those streamlining -- incorporate those streamlining measures. But in our recommendation for an interim program, we recommended that you change the threshold on investigation as well as incorporate the streamlining measures.

It's just a way that the fourth option is worded.

CHAIRMAN RICHARD MESERVE: In your

presentation and in the paper, you described your proposal, Option Three, which is to proceed with a rule, as being one that you belief reduces burden. I'm a little puzzled by that.

WILLIAM KANE: On us, move it on us.

CHAIRMAN RICHARD MESERVE: And I'm being asked a question about that. And as you've described it, however, you described Option Three in the papers, described it as one that certainly involves not only the new attributes associated with whatever's entailed in assuring that there's an appropriate safety conscious work environment, but also an investigation of individual cases, at least at some level.

Commissioner Merrifield has made the point that a large number of the cases that are presented are not substantiated already. But presumably, you have to do those investigations in order to be able to determine whether they are ones that you need to fold into your consideration or Option Three.

I'm sort of puzzled at the assertion that Option Three is somehow -- it may well be proactive. It may well get us in front of the problem, maybe we'll

have less claims. But if a lot of claims are not being substantiated, then maybe they're not indicative of a safety conscious work environment. And I sort of wonder how this system, as you've described it, could conceivably reduce burden for either us or the industry.

WILLIAM KANE: Well, I think the burden that's on the industry is primarily on the back end of the process in, you know, once -- and I always believe the Task Group, when they went out and had the meetings, that was the principle burden that the industry was concerned with, the investigation and the time it took to do the investigation.

I think division of the Senior Management Review Team was that, if we were to be able to incorporate a system that worked effectively, we reduce the number of allegations and discrimination by focusing on the front end of the process. That that would in fact reduce a burden, not only for the licensees but for us in terms of the number of cases we would be have to investigate.

CHAIRMAN RICHARD MESERVE: Well, I could understand that that, hopefully, would reduce the number

of substantiated allegations. But I don't understand for how it reduces unsubstantiated allegations.

I mean, presumably, they are the ones who are -- if we're right in our decision making, and that's an assumption, but if we're right in our decision making, we're getting claims that come in that, when we look at them, aren't real indicators of a problem, safety conscious work environment. And I don't understand how those get flushed out of the system.

WILLIAM KANE: By establishing the threshold that we talked about, those cases would be turned back over to the licensee who would review them, provided that we had, through our evaluation of their program, decided that it was running affectively, that they could do so.

CHAIRMAN RICHARD MESERVE: It seems to me that argument goes to Option Two, changing the threshold, not to the addition of a safety conscious work environment rule.

WILLIAM KANE: Well, we indicated that one of the things that would be addressed in the rule would be that threshold for conducting investigations. That's an

attribute of the rule that would be established.

SAMUEL COLLINS: And ensuring that the licensee's program is capable of dispositioning those issues, which is setting up the structure for that process.

WILLIAM KANE: Which then brings you back to a parallelism to the Reactor Oversight Process.

CHAIRMAN RICHARD MESERVE: Let me ask just one other question then. I mean, I wasn't here for Millstone, I was not here when there was discussion within the Commission in '97 about whether we should proceed on a safety conscious work environment rule. So I don't have the benefit I think several of my colleagues have, having been through that process.

As I've gone back and read about what we did in '97, there was grave concern that we would be unable to regulate in this area objectively, which is something we've been obviously trying to achieve in our inspection program.

When you said things had changed since '97 you did mention the Reactor Oversight Process. But on the fundamental question about, are there ways in which we

can get into this business objectively, I must raise the question of whether things have changed since ’97.

Do you really think there are indicators, or other means that enable us to assess this in a way that’s fair and uniform and accurate as we look across the industry? I mean, we concluded we didn’t have that capability in ’97. And what’s changed in that dimension that causes us to think we can do it now when we didn’t think we could do it back then?

WILLIAM KANE: I think the answer is principally, the Reactor Oversight Process which is, that system has built indicators of performance that we monitor and measure. And we believe it can be done in this area as well.

WILLIAM TRAVERS: I think we believe there are indicators that can be useful in establishing, in a graded fashion, the sort of interaction the agency would have when performance indicators or the inspection module that we currently use give us reason for some concern.

So I think if you look back at plants that have had problems with safety conscious work environment

who have established their own get well plan, they've established, in that get well plan, quantitative indicators of how well they're doing.

Similarly, the vision, even if we haven't picked one out just yet, is that you could establish some performance indicators in the program that would give you a sort of proactive view of the health of a program, and that that proactive information -- I'm going to go back to another question asked -- could be useful in making determinations on individual cases as they were raised.

So if you're looking for a threshold, for example, for launching, or not, an OI investigation, you might be able to use your existing knowledge about the health of the employee concerns program and it's workings by virtue of both performance indicators that you've seen over time and inspection results that you've garnered in making the decision about whether to launch an OI investigation or to allow and credit, by virtue of you've seen in this program, the program to disposition the issue.

CHAIRMAN RICHARD MESERVE: Would you

characterize this as a situation in which you believe you could have performance indicators? Or if I were to ask you, give me your objective indicators today, you would be able to just write them down?

BILL KANE: Some of those indicators are identified in the Task Group Report. But I believe they would have to be developed in a consensus fashion, as we have done with the reactor oversight program.

CHAIRMAN RICHARD MESERVE: Commissioner Dicus?

GRETA DICUS: Thank you. Several different concerns that my colleagues have voiced I share. So I won't belabor those. I might give the panel coming up a heads up. I would be interested in knowing what you think, of the goals that we have, which of the options best meets them.

So let me just go to one point. Well, you don't have slide numbers, but it's the one where you suggest the graduated Safety Cultural Work Environment Program, for different classes of licensees. And I think that your input there, medical licensees or gauge licensees, et cetera, would have a different program.

Would you give me a little more information on

that? Because in some of our medical licensees where we have major overexposures is where we have in fact had impracticalities. So tell me what your thoughts are on that.

WILLIAM KANE: Well, I think, as opposed to having the kind of employee concerns program that might be envisioned at a large licensee, I think there are elements of, again, that are very important for really all classes of licensees. And that consists of understanding of their responsibilities under 50.7 through training of supervisors and training of employees and consistent communications. And that, we believe, would apply independent of the size of the licensee.

GRETA DICUS: But if you're going to go, if you're suggesting that we consider going to a rule making, what do we do with that, with these classes of licensees? They're not covered or --

WILLIAM KANE: No. They would be covered. But the size of the rule making, or the number of requirements, would be tailored to the size of the licensee. We would have to look at different classes of

licensees and see how much of the program that we would apply to large licensees should be applied.

And you know my view is that that certainly needs, at this point, to involve the communication and training aspects of dealing with employee concerns.

GRETA DICUS: Okay. Is it fair enough then to say that we're not far enough long in the process to give me much more information? Because I'm not getting that much on what you have in mind. Is that fair?

I mean -- so apparently you're going to have to have guidance, we're going to have something where we're going to explain what we're going to do with these other classes of licensees and how we classify them. I mean, gauges, medical, what?

WILLIAM KANE: Yes. We have a broad range of licensee from, as we indicate in the report, independent spent fuel installations down to radiographers. So you would have to tailor the set of requirements that would be in the applicable rules for each of those licensees.

GRETA DICUS: I'll stop at this point.

SAMUEL COLLINS: I think it's important to note that the numbers we're talking about, for example

the annual report in ’01 indicated that the number of allegations of discrimination in the materials area was fifteen in 2007 and seven in 2001. So we’re dealing with a very small set. Even if we handle them uniquely, the workload is probably manageable.

CHAIRMAN RICHARD MESERVE: Commissioner Diaz?

COMMISSIONER NILS DIAZ: Thank you, Mr. Chairman. Of course I do share the same concerns of my fellow Commissioners, which is, this is an issue that we’ll always have strong interest on it. Let me take a little different place here as this refers to some of my background.

You know, we all know employer/employee relationships with very complex issues, especially in a free society. They’re a lot simpler in a non-free society. And so we might be thankful for the opportunity to have to deal with these issues rather than not have to deal with them. I’ll just bring that perspective because these are some important issues.

So the fact that we’re here in itself is a great thing. It’s not an issue that is very amenable to be solved quickly or promptly, nor will it ever be

solved perfectly. And, you know, in that lack of perfection, there is great benefit to the society because it allows the individual credence to be exercised. It allows all kinds of things that are unique to our society. So it's not all bad. We're not here because things are broken, but because we want to make them better and that's not bad at all.

Having said that, I would, again, not in as strong words as Commissioner McGaffigan, but to do believe we can regulate safety. I really cannot see how we can regulate a safety cautious work environment. It's very, very amorphous, very difficult, so many different sizes to it.

I think what my feeling is -- and I think what my fellow Commissioners expressed is that we want to improve the process. How we do that is still a question. We have a series of recommendations. And many of these things will go away if the Department of Labor will have a very streamlined, you know, fast process. I don't think we're going to be able to change that. I mean, many of the things will actually go away, and I think we'll all realize we're not going to be able

to do that.

So the question is, and the question that the staff is posing to the Commission is, which are the best options that we can have? And I think we're going to strive to get some answers to that process. We've got some. I don't think we've got all that we wanted to.

So having made that statement, let me just come with the question now. How do you respond to the very strong concerns expressed by so many stakeholders that working toward a safety cautious work environment rule will, in essence, be an infringement or a significant change to NRC's determines of discrimination.

WILLIAM KANE: I'm sorry, Commissioner. I didn't quite --

COMMISSIONER NILS DIAZ: There have been many opinions expressed that working toward a safety conscious work environment rule actually means we're sliding back in the way we deal with discrimination, you know, issues. How do you respond to that?

WILLIAM KANE: Well, I would not see it as sliding back. I would see it as providing additional

reinforcement for how we believe this area should be dealt with. I think putting the foundation for how we intend to regulate in that area in a rule would certainly be perceived as certainly not sliding back.

COMMISSIONER NILS DIAZ: You don't see this as an infringement on the processes that we presently have toward handling discrimination cases in a fair and equitable manner?

WILLIAM KANE: I do not.

WILLIAM TRAVERS: The way I would view it is more of a formalization of the expectations that the Commission layed out in '96. Those expectations are ones that we now react to in cases where allegations of discrimination are brought to the staff.

And this option that we provided the Commission poses a more proactive approach, formalizing those requirements. Admittedly, not an easy thing to do, because of the subjectiveness of this area, so that will make it tough. But I don't think we would view it as a retrenchment of sorts.

COMMISSIONER NILS DIAZ: It appears that, I think the Chairman touched on this, that the safety

conscious work environment rule and probably during the interim, we will have a high threshold for individual cases, maybe severity level three or above.

What other triggers would apply to dealing with individual cases? What mechanism will be used to determine what level we go in? Do we make a new board and have the board review these things? How do we deal with that?

WILLIAM KANE: This gets to your recommendation. But the way we engage in the -- typically in the regions when we have allegations of that type, we form an Allegation Review Board to determine how the agency should respond to a specific allegation. We would continue to use that process. Now, the triggers that you indicate in your report, you might want to go through those.

FRANK CONGEL: Sure. I'll offer Cindy an opportunity to respond.

CYNTHIA PEDERSON: We talked about a number of factors that we would consider. Currently we look at the level of the manager. And that's predominantly the sole basis we use for evaluation of what current

severity level it is. We think that needs to be added to.

That would still be a factor because a higher level manager would have the ability to influence a greater number of people and have a greater change on the environment facility. So we still think that's important.

We also would look at the severity of the adverse action. A simple comment between two people that has not been heard by others has a different impact on the environment than someone being terminated in a very public way. So, again, we're trying to look at the potential impact on the environment.

Another factor we would consider is, did the protected activity involve coming to the NRC or another federal or regulatory body? We think that makes it more serious.

Again, notoriety, if someone is marched off publicly and dismissed from the facility, word gets around very quickly of something of that nature. And again the environment could be impacted more greatly.

And then lastly, we considered one additional

factor; was there a benefit to the person who conducted the discriminatory act? Did it further their career, or did it prevent something else from coming to light? All of though things, we felt, were more significant.

So we looked at a process where those factors would all be considered. And if they passed through those with negative responses and none of those conditions applied, we would consider it to be a lesser or a severity level four type discriminatory.

Any of those in a positive fashion, a higher level manager, higher notoriety, coming to the federal government, et cetera, would be considered severity level three or higher, was our proposal.

COMMISSIONER NILS DIAZ: I see. So severity level for both, under Option Two and Three, would be handled the same manner that we're handling them now?

CYNTHIA PEDERSON: I can speak for the Task Force Recommendation. And that was we would consider those to be turned over to the licensee with the whistle-blower's permission. And I believe that was similar --

WILLIAM KANE: That's consistent with what we

would propose as an interim approach.

COMMISSIONER NILS DIAZ: Thank you, Mr. Chairman.

COMMISSIONER EDWARD MCGAFFIGAN: Mr. Chairman, there's one question I meant to ask. I thought all my questions were for the second panel.

The safety conscious work environment rule as you proposed it, twenty seconds on why it would pass the rule; why there's either a substantial increase -- or both, a substantial increase in public health and safety and it would pass a cost benefit to us?

CHAIRMAN RICHARD MESERVE: You only have twenty seconds.

COMMISSIONER EDWARD MCGAFFIGAN: It may have been a rhetorical question.

SAMUEL COLLINS: Commissioner, it would have to reach the adequate protection standards.

COMMISSIONER EDWARD MCGAFFIGAN: Just have to be adequate protection? We have to say that this thing that we haven't been doing for the last twenty-five years, that it's so important to do that it's adequate protection?

Thank you.

CHAIRMAN RICHARD MESERVE: All right. I would like to thank the staff. It's been a very helpful briefing. We now have a panel of stakeholders that are going to be joining us.

Thank you very much.

COMMISSIONER JEFFREY MERRIFIELD: Mr. Chairman, while our next panel is assembling, I would want to make a comment. And that is, I think -- and perhaps you all should have done it. But I think both the Task Force, as well as the Senior Management Review Team, should be commended for the tremendous amount of effort and time they put in to try to provide some comments. We were kind of critical on them, or some of the comments were somewhat critical today. But I think, obviously, they've put in a lot of time and effort and sacrifice to bring us those conclusions. And I certainly would want, for the record, for that to be noted, Mr. Chairman.

CHAIRMAN RICHARD MESERVE: I think that that's correct. And I think that just reflects the difficulty of the issue that we have in front of us, that all of

us, as we probe into these kinds of things that we want to pursue.

Our next panel consists of David Lochbaum, a Nuclear Safety Engineer with the Union of concerned Scientist; Billie Garde is an attorney with Clifford, Lyon's, & Garde and has had extensive experience in the matters we're discussing today; and Ralph Beedle, the Senior Vice President and Chief Nuclear Officer for the Nuclear Energy's institute.

We would like to thank you all for joining us today. I would like to -- I think this may be the last time as a Commission that we have an opportunity to engage with Mr. Beedle, who I understand will be retiring in a few weeks. You've had the opportunity to, on a variety of occasions, to appear before us in this fashion and have been helpful in our deliberations.

On behalf of the Commission, I would like to extend our best wishes for your future endeavors.

RALPH BEEDLE: Thank you very much, Mr. Chairman.

CHAIRMAN RICHARD MESERVE: Mr. Lochbaum, would you like to proceed?

DAVID LOCHBAUM: Sure. Good morning. Slide two, please.

<SLIDE NUMBER 2>

The Discrimination Task Force conducted a dozen or so public meetings across the country. In the course of those meetings, the only time that the safety conscious rule making was discussed was in terms of something the NRC was not going to do. But we'll think it's deceitful for the Senior Management Review Team to advocate now what has been repeatedly and consistently been presented as a nonoption in public meetings.

Slide three, please.

<SLIDE NUMBER 3>

We feel that this bait and switch approach to regulation erodes public confidence. Let's say for the moment that the NRC embarks on a rule making process for a safety conscious environment. Why should I or any member of the public bother to participate in a process when NRC senior management has demonstrated that it will jettison all the work of its own staff and the public if it, and it alone, wants something else.

Slide four, please.

<SLIDE NUMBER 4>

There remain two huge obstacle to UCS supporting safety conscious work environment rule making. First, we're not convinced that the matrixes exist for objective assessments of a safety culture.

Look at corrective action programs today. The typical nuclear power plant generates about 2000 corrective action reports each year. NRC inspectors have a statistically significantly populated database with which to assess the health of corrective action programs, yet they were unable to identify the badly deficient programs that Davis-Besse or DC could until after the fact. And these are very talented and dedicated people doing their level best.

We think it's unlikely that they will be able to do any better given less data with greater subjectivity. UCS does not want to be a party for setting up NRC inspectors for failure.

According to Mr. Congel and others, approximately 10% of the allegations received by the NRC are validated. According to the inspector general of the NRC, approximately 30% of the NRC staffers who raise

differing professional views or differing professional opinions feel they are retaliated against. Is this the right agency to assess safety conscious work requirement? If so, why doesn't that agency look in the mirror?

The second obstacle -- I almost forgot -- the second obstacle we have for a safety conscious work environment is that the tools for a safety conscious work environment, such as employee concerns program, employment action, review efforts, and so on, only work when they're the tools in the hands of capable people.

You can't take Millstone's tools and procedures and databases and deliver them to a plant with a safety conscious work environment problem and expect magical improvement. The tools only help those who want to do the right thing. But arming somebody who doesn't want to or who is unable to do the right thing with these tools only provides that person with ample cover for continuing to do the wrong thing. It can point to the tools and claim to be "just like Millstone," daring NRC to do otherwise. UCS doesn't want to be a party to setting up inept managers for

sustained failures.

Slide five, please.

<SLIDE NUMBER 5>

Enough of what we don't want, we would like to turn to what we do want. First, we think OI should continue to investigate all harassment and intimidation allegations that meet the current threshold.

If you were to raise the threshold and leave a criteria like notoriety or the level of management who might have been involved, all it simply means is that's the way you craft the allegation. You craft it saying that this chief nuclear officer was the person who aided an abetted in what was done to get above the threshold. That action is inconsistent with the ADR process, because if notoriety is one of the triggers that brings about the investigation, notoriety is one of the things that we can help civil lawyers with. So that standard would seem to hurt your workload and the burden on the licensees rather than help. So we think the existing threshold is just fine.

Second, we do support that if all parties agree -- and we stress all parties, which includes the

NRC staff, we think alternate dispute resolution can be used in lieu of an OI investigation, even into alleged harassment and intimidation.

I guess we differ a little bit from what we understand Mr. Congel presented in that, even if it were a potentially significant issue or, you know, a major waterfront issue, if all parties agreed to it, we think that could still go into ADR. Otherwise, you're relying on people to have crystal balls into knowing the answer early on. And I'm not always sure this's possible.

Currently, OI substantiates harassment intimidation allegations only after concluding who did what to whom. After that conclusion is reached, we think the NRC must hold those individuals accountable. The severity of the sanction can vary depending on the specifics of the case. But the NRC cannot continue its practice of rarely sanctioning people who retaliate against workers raising safety concerns.

The safety conscious work environment rule Making, recommended by the NRC Senior Management Review Team, would essentially make the entire industry pay for the mistakes of a few people in the industry. The three

steps that we've outlined would restrict that payment to only the guilty parties. We prefer our three steps to the NRC's missteps.

Thank you.

CHAIRMAN RICHARD MESERVE: MS. GARDE?

MS. BILLIE GARDE: Mr. Chairman, I'm inclined to not follow my slides at all and just discuss some of the points that I've heard here today. And with your permission, I would like to do that.

CHAIRMAN RICHARD MESERVE: That would be fine.

MS. BILLIE GARDE: The key question that I think that the NRC has to answer is whether or not the NRC's current processes ensures the free flow of information from employees about potential safety concerns. That really is what this is all about. And that really is why the NRC is involved in this issue at all. It's the only reason that retaliation is a concern to the Commission, which is not in the business of human relations or personnel work.

But it is an important enough reason that it has received the attention of this body for the last thirty years.

I was going to start by reviewing -- and I brought my stack with me -- of task forces and reports and studies and IG reports, beginning in 1984 that have been done on this subject. But I think that the questions really have joined on the discussion that I've heard this morning.

And I would like to tell you that I think the agency is in the right place. Notwithstanding my criticisms, suggestions on this issue, I think the idea of the NRC heading toward where other industries are on this issue would be a drastic mistake.

This agency is so far ahead of other public health and safety agencies on this issue. It is light years ahead. It is in the right place. It continues to move forward.

In other agencies that have similar rules, the regulators don't have a clue about what they're even looking at. And I do want to continue to commend the work that this Commission has done in this regard over the last twenty years.

I would consider it major backsliding to try to take the agency to where other agencies are in this

regard.

I also agree that achieving the objective that has been discussed by all parties today can be done without rule making. The problem is, it hasn't been done without rule making.

And if you go back and pick up, even the 1993 IG report I have in front of me, all of the reports make the same essential recommendation and find the same essential finding. And that is that the NRC staff is not equipped or trained to deal with discrimination issues in a way that gives satisfactory answers to the primary question, which is: At a particular site where an incident of harassment has occurred, has it impacted the free flow of information to the government, to the Commission; Are workers continuing to raise safety concerns?

And over the last ten to fifteen years, that role of the agency has gotten very, very much tied up in the details without, I think, a lot of increase in public health and safety.

We've had a lot of discussion about Millstone. And as most of you know, I was on the independent review

team at Millstone. And I have seen similar Millstone type models started at other facilities. In fact, I'm working on one at Main Yankee. And I can tell you that it does work.

The concept of adpotiong safety conscious work environment requirements, performance measures, and elements of a program, implementing those programs according to your performance indicators and measuring those performance indicators can work.

And I want to get right down into kind of the nitty-gritty about how that works, particularly in response to you, Commissioner McGaffigan, in terms of your questions.

In a program that has a highly developed safety conscious work environment program, you will have a number of elements. You will have an employee concerns program or an alternative method for employee to raise concerns, which does their work in accordance with an independent set of criteria that virtually matches what is expected or what would happen in a Department of Labor context; that is they use the same standards of proof, the same standards of evidence; they

gather the same type of information.

And in doing that, you have an incredibly competent group of professionals at the site, very familiar with all of the parties, the detail, the history, that comes up with as close to an answer that either the NRC or the Department of Labor would come up with.

And that's dangerous territory, very dangerous territory for a licensee, because you're asking them to find on themselves in potential 50.7 allegations.

Can they do it? Absolutely.

Do they do it. Absolutely.

It can be done. And that does work to solve the problems. But even more importantly than that is the role of the executive review board.

And Commissioner Merrifield, if you reviewed the statement, as I did last night, on the 1996 policy statement, and saw the emphasis that the Commission placed in that statement on the role of executive management in decision making, put that in the framework of what I'm suggesting.

Millstone had what was called an executive

review board. By any other name, what that involves is a group of executives at the executive level of the company, senior managers of the company, that essentially review every personnel action or adverse action that may result in a Department of Labor complaint.

That means you have a group of people who sit down, hear the facts about a proposed termination, a proposed removal from service or a transfer, probe using the same criteria that the NRC would use, what's the basis for that decision? What is basis for making that decision when no one else used the same standards to apply to it?

At Millstone, when they started the executive review board process, 80 to 90% of the proposed personnel actions were rejected by the executive review board. That is, the executive review board said to the manager or supervisor, your story doesn't hold up. You want to terminate John Smith for doing this, but you didn't terminate this person, this person, this person. And in fact John Smith just spoke to the NRC inspector yesterday. We can't support your recommendation for

termination. That's a Department of Labor case that doesn't get filed. That's an NRC allegation that doesn't get filed. 80 to 90% of them were originally rejected.

Within a few months, that process, although it was not popular in the beginning, that process got down to the point with individual first line managers and supervisors were only being rejected, in terms of their recommendations, about 10% of the time.

What happened in that? Did they stop taking disciplinary action? No. They learned the expectations of Millstone senior management to do their job as first line supervisors and managers to ensure that personnel actions that were taken did not create a chilling effect.

And we get back to the key responsibility, to make sure, no matter what, that the free flow of information continues, because the free flow of information hasn't stopped from the whistle-blower. They've already raised the issue. The free flow of information stops from those who watch what happens to the whistle-blower.

Davis-Besse didn't have a single concern raised to the NRC in 2000. Does that mean they didn't have a problem with the free flow of information to the government? I don't think so.

When you have training on this subject, what you learn is there's more than one way to stop the free flow of information. One is retaliation, over retaliation. That's what happened at Millstone.

The other is just simply not to do anything, to create an environment where raising questions or issues results in nothing happening.

I would suggest to you that's more about what happened at Davis-Besse then over retaliation.

But how does the staff look at that? If the company isn't going to manage it's its own work environment, then I suggest to you that staff can't go in. They don't know enough about an individual work environment.

It is possible for each individual licensee to know what it's objective is. And in that, I agree with UCS. It should be a results oriented process. And the results oriented process can be worked by the staff in a

way that they can expect a licensee to write indicators.

The five elements, key elements from my perspective of developing a safety conscious work environment, or safety culture, is training on rights and responsibilities.

At Millstone, there was a lessons learned study done on every incident of harassment and intimidation to look at what the common themes were that resulted in both the event happening and the change in the process. And the primary thing was, when managers and supervisors were trained, they didn't make the same mistakes. And that's because the laws that impose these requirement, 50.7 and the Department of Labor rules in this industry are counterintuitive.

It does not make sense to tell a manager, you cannot require your employee to go up the chain of command. And if you join this industry from another industry or from the military and if you're not trained and told, the rules are different here for a reason, they don't understand that necessarily. And they will make mistakes. Some of those mistakes are unintentional mistakes.

And when you litigate cases as I do, you see most of these cases are mistakes. They're mistakes that resulted from people not knowing the rules and management not providing oversight.

Some are intentional. There are cases, for example, if you had an executive review board and the executive review board recommended that you not terminate this person and the company did any way, that would be a threshold for investigation. That would be an indication of an intentional decision to terminate someone in the light of every reason not to, including chilling affect.

Second, there needs to be communication of expectations on rights and responsibilities. That is not always done.

Our firm litigated a case against Texas Southern University some years ago in which the employee only found out that he had any rights or responsibilities by accident.

Texas is an agreement state. The form wasn't posted. The only reason this guy found out he had any rights and responsibilities is because his wife worked

with a wife of a person who worked at South Texas Nuclear Plant.

His case was litigated. He won his case. The NRC did absolutely nothing about that case. And there were no changes made at the University.

But he never knew what his rights and responsibilities were. It does not -- it doesn't increase a regulatory burden, when you give a licensee to someone, to expect among the programs that they provide to you a program that's going to say how they train people, how they communicate rights and responsibilities, And how they're going to do that.

The third element is an alternative means for workers to raise concerns using criteria that the NRC or the Department of Labor would expect.

The fourth is performance indicators and measurements, a combination of objective and subjective standards that can be easily written once you understand what the expectations are.

And finally, an alternative review process run by executive management to make sure that the mistakes that can happen, the mistakes that do happen, the

mistakes that have ended up in congressional hearings, litigation, and changes in this agency that it has reacted to for the last twenty years, don't happen.

I think it can be done. I think it should be done.

The primary reason I'm supporting rule making is that nothing else has worked. Thank you.

CHAIRMAN RICHARD MESERVE: Mr. Beedle?

RALPH BEEDLE: Good morning, Chairman, Commissioners. Thank you for the opportunity to comment on the NRC's procces for handling discrimination issues.

These issues is of serious importance to the individuals that work at our nuclear facilities.

However, before I turn to the details of our views on the staff's options and recommendations, I would like to offer a few recommendations concerning this topic generally.

First and foremost, the Nuclear Industry understands it must maintain a safety culture that is best described as an overarching corporate and work force recognition of the need to protect public health and safety. It is each nuclear plant's single most

important priority.

A sound and safety culture clearly assigns priority to safety over economic performance, and is characterized by a host of features, including defense in depth and plant design and operation, election of properly degreed and trained personnel, application of a conservative approach to protecting the reactor core, and adherence to all procedures and processes as a means of minimizing operational risk.

A safety culture involves the constant use of rigorous technical evaluation, affective communications regarding all identified safety issues, and prudent decision making.

These features are combined to ensure public health and safety and promote ever rising standards of excellence in operational performance.

A safety culture also embodies a set of responsibilities to raise and resolve issues, to set high standards of performance and assure individual accountability, to maintain an appropriate work ethic, and to align management employee goals, much as Billie Garde has just described.

Safety culture responsibilities run both to the organization generally and to the individuals who make up that organization, management and non-management alike. Safety culture may be thought of as an umbrella culture that sets the framework and sets the tone for every activity that takes place on a nuclear site.

As part of its every to ensure safety culture, licensees also are fully committed to maintaining a safety conscious work environment.

We believe that the safety conscious work environment is a necessary component of a safety culture. However, these two concepts are not the same, and in fact, using them interchangeably is confusing.

A safety conscious work environment means that the nuclear workers are free to identify safety issues.

A safe and successful commercial nuclear program depends on a work environment which the work force freely identifies and communicates safety concerns.

Both the nuclear work force and the management team must be knowledgeable about the appropriate means of communicating and responding to the identified safety

concerns.

The nuclear industry's operating statistics and those gathered from the Reactor Oversight Process confirm that the industry's safety record has been achieved, at least in part, because nuclear organizations encourage workers to identify safety concerns and demand that managers respond appropriately to identified concerns.

There's no question that nuclear workers contribute to the objective of the larger safety culture when they raise safety concerns. But a safety conscious work environment, without the broad based components of safety culture, will not produce a safe culture.

A safety conscious work environment is only one aspect of the culture. And similarly, handling of discrimination or having raised safety concerns, is only one part of the safety conscious work environment process.

In this regard, we have observed that too much of the NRC's focus has been on individual discrimination allegations, as though such allegations alone are a measure of the safety conscious work environment.

We should not now make even a greater mistake in equating isolated discriminating issues with safety conscious work environment, and in turn, the entirety of the broader safety culture.

I make this point because the question originally posed to the Discrimination Task Group and now before the Commission is the following: is the NRC adequately and appropriately implementing the agency's regulations which address the licensee's alleged retaliation against an employee who engaged in protected activities?

As you're well aware, the industry believes that the agency's handling of this issue could be significantly improved. Although the Senior Management Review Team and the EDO have identified several options, none seem to achieve the appropriate balance between deterring discriminatory action and ensuring that a licensee's work environment is not impaired.

Throughout the two year review process undertaken by the Discrimination Task Group, and now the Senior Management Review Team, the industry has consistently advocated aggressive reform in the NRC's

implementation of its discrimination recommendations and associated processes.

We have made the relatively straightforward recommendation that the NRC allow individual claims of discrimination to be addressed the way they are by every other regulator in every other industry, that is, the Department of Labor.

Other federal agencies do not conduct independent inspection, investigation, or enforcement activities related to their discrimination claims. Nor do they consider the impact of finding of discrimination to have -- nor do they consider the impact that finding of discriminations have on the work environment. The deterrent effect of the DOL's process is judged to be sufficient.

It is also reasonable to infer that other agencies do not evaluate the impact of discrimination on the work force environment because they recognize that employers will appropriately respond to a DOL finding of discrimination.

And although the NRC may have the statutory authority to support independent enforcement action for

discrimination cases, such action is wholly inconsistent with the actions that other similarly situated federal agencies have.

Clearly our recommendations that the NRC be treated as all other nuclear industries are treated, is not new. We recognize that the pass group not only rejected this recommendation but indeed proposed eliminating it, even in its current practice, to deter the NRC's investigation of discrimination of claims until DOL had concluded its evaluations.

In fact, the Task Group would have NRC and DOL investigate every discrimination claim in parallel. We strongly believe that the Commission should not only reject the Task Group's proposal, but more importantly, reject this narrow enforcement driven approach and the assumptions that underlie it.

Importantly, the EDO's recommendations concluded that it may indeed be appropriate to significantly limit or eliminate the NRC's role with respect to discrimination claims.

However, the EDO has concluded that the NRC can only do so if the NRC prumelgates a rule addressing

safety conscious work environments.

As evidence by the actions of all other federal agencies, this either/or scenario appears to be based on the assumption that NRC enforcement is the only means by which licensees will achieve open work environments.

I think it is important that the Discrimination Task Force noted that, in the nuclear industry, discrimination does not appear to be a common or prevalent problem. The Task Group further acknowledged that the NRC licensees generally seemed to recognize the value of a safety conscious work environment. And it appears that the nuclear industry is one of the more proactive industries with regard to soliciting concerns and feedback from the work force.

The Senior Management Review Team and the EDO advocate direct regulation of safety conscious work environment with the assumption that a rule would provide criteria which, if abided by, would guarantee a safety conscious work environment.

As Chairman Meserve stated in a recent speech to the INPO CEO conference, there are clearly valid

reasons why the NRC has not previously issued a regulation of this sort.

Not only has there not been shown the direct regulation of safety culture or a safety conscious work environment, but such a regulation, necessarily, would be very subjective. It is likely to intrude inappropriately on management prerogatives. This intrusion may well create a chilling effect on the most effective safety culture element, the commitment by the organizations management.

For similar reasons, the Discrimination Task Force did not recommend a safety conscious work environment rule because, in their report, the Task Group wrote, it would be difficult to develop, define, inspect, and enforce a rule requiring a safety conscious work environment.

Previous attempts to develop such a rule were withdrawn due to the difficulties associated with developing requirements and assessing criteria.

These reasons remain valid today.

What has the industry been doing? The industry has been active in a number of areas that

facilitate worker communication of safety concerns; employee concerns programs, hotlines, ombudsman programs, and when necessary, third party oversight boards and executive review boards, as well as multidisciplinary management teams, to mention a few.

Licensees provide training to ensure management develops the skill to respond and resolve safety concerns in a timely appropriate manner. Licensees also educate nuclear workers to understand their responsibilities to identify safety concerns and their right to do so without retaliation.

Can licensees do more? Certainly. And the efforts to improve are ongoing. INPO has recently piloted a new evaluation process with a sharper focus on safety culture. Evaluation of organizational behaviors, leadership, and core values will provide better insights into safety culture.

Additionally, the industry is considering industry based standard reviews of various safety conscious work environment programs. In some, the industry recognized that it must instill the proper attitudes and behaviors to promote a safety conscious

work environment, and thereby avoid any incidents of discrimination.

And what does the industry pose that the Commission do? The current regulatory approach presumes a widespread work environment problem that simply does not exist. And it assumes that enforcement in individual cases of alleged discrimination will yield the desired attitudes and behaviors. The Senior Management Team itself stated that a fundamental change in this approach is needed in order to move the Employee Protection Program from a reactive function, which relies on investigation enforcement, to a proactive one.

Accordingly, I believe that several ideas raised by the Senior Management Team warrant further dialogue and development with the participation of the NRC and stakeholders. In many ways we believe that the Senior Management Review Team has attempted to, and indeed has been, responsive to stakeholder input.

While the industry's suggested solutions do not include a safety conscious work environment rule, they do include a number of actions that would accomplish the goals described by the Senior Management

Review Team.

The NRC, industry, and other stakeholders, may find common ground by focusing on practical programs, processes, and performance measures that have been used to improve work environment at many stations. This effort can be identified by best practices already shown to be effective.

The results of such effort could be made part of, or otherwise supplement, the current NRC policy statement, encouraging licensees to maintain the safety conscious environment.

As already noted, the NRC should permit the Department of Labor to handle the individual discrimination claims. If the agency is to continue involving itself in individual discrimination cases -- and we would expect this would be a diminishingly small number of these -- stakeholders must be provided with a clear understanding of the specific thresholds and criteria for retaining such cases.

Further, the agency must provide stakeholders with a clear description of the applicable legal standards. These standards appear to have changed in

the past few years without deliberate decision making progress overseen by the Commission.

The objective would be, however, to decrease the agency's reliance on this regulatory approach. We stress this point because the OI investigations have a very real affect on the work force, one that chills efforts to enhance performance, ensure appropriate standards, and instill accountability.

We are concerned and believe that the Commission should be similarly concerned in that this approach could have a detrimental affect on achieving a safety conscious work environment and in turn a true safety culture.

Further, for those few discrimination cases in which the NRC is involved, the industry supports the use of alternative dispute resolution techniques. The alternate dispute resolution ADR process should have as its goal reconciliation and mutually agreeable resolution.

In this regard, the NRC should recognize that if an acceptable solution is achieved, there's no need nor regulatory benefit in undertaking an OI

investigation or enforcement action.

In conclusion, the industry appreciate's the Commission's consideration of these issues. The Senior Management Review Team's efforts certainly demonstrate the desire to ensure that the regulatory approach fosters and maintains enhancement of safety conscious work environment foundations already established through industry efforts.

Although it appears that the Discrimination Task Group's recommendation presents strong defense of the status quo, if change is to take place, the Commission will need to step out and make that change for real progress to be achieved in this area.

Commissioner leadership is needed. We would encourage the Commission to continue to provide a forum for further discussion and to encourage staff to focus on the strides already made in the area of the safety conscious work environment.

And the industry would be an enthusiastic participant in this process.

Thank you, sir.

CHAIRMAN RICHARD MESERVE: I would like to

thank you all for your presentations.

Commissioner Merrifield?

COMMISSIONER JEFFREY MERRIFIELD: Thank you, Mr. Chairman. I want to follow up on the Chairman's comments about Mr. Beedle's retirement. There have been times where he and I have agreed, and there have been times where he and I have disagreed on things. But I would say he has always been a very vigorous, zealous advocate for the utilities he represents. And that's a strong legacy in that regard.

Following my traditional role, normally, I would lecture Mr. Beedle on the fact that his testimony did not arrive in a manner timely such that we could review it in the way that normally I would like to. But using the theory once advocated by former Senator Allen Simpson, I will allow Beedle to blame his staff for that egregious error.

COMMISSIONER EDWARD MCGAFFIGAN: So you get a get out of jail free card.

RALPH BEEDLE: I do want to make a promise never to do that again.

COMMISSIONER JEFFREY MERRIFIELD: If only you

can make a promise on behalf of the entire NEI, it would have been more satisfying.

I want to focus on two things for my questions to you. We've had a lot of discussion on the issue of ADR today. As you know, that's an issue which I've had some favor with.

Could you talk a little bit about where you sense NEI is coming from in that stand point? One of the things that Mr. Lochbaum has suggested is that should be an alternative early on in that process. Is that something you see as supportable by your members or not?

RALPH BEEDLE: Well, I think the ADR process is something that the industry would support. And I think it stems from the recognition -- and I think it's been acknowledged by the previous panel.

And I think Billie would agree with me that many of the problems we see in these discrimination cases are clearly ones of miscommunication. And the ADR represents a process by which you can resolve some of those miscommunications and arrive at a satisfactory resolution of that process to the mutual agreement of

both the individual that feels they've been discriminated against and management. And it doesn't carry with it the intrusive protracted process that an OI investigation does.

COMMISSIONER JEFFREY MERRIFIELD: The second question I have is, you know there has been discuss today about training issues. Exelon has recently agreed to embracing a training program for all of its senior and line management folks, to train them on the issues of which we discussed today.

What is the general view of NEI as a whole? Are they willing to also embrace these programs at other utilities?

RALPH BEEDLE: Well, some years ago, when we were very concerned about the use of a rule making process, we had embarked on the development of what we call the tool kit or ECP and safety conscious work environment processes. And we, in that case, provided a whole series of best practices for the industry to use. I would say, in general, those are used by most plants.

Could we improve the training? Undoubtably we could. I think Exelon is a good example of where

they've concluded that they need to improve the training. So I think it's an important element in this process, one that the industry certainly recognizes the need for.

COMMISSIONER JEFFREY MERRIFIELD: Ms. Garde, in Mr. Lochbaum's statement, he talked about the notion that we should go ahead and investigate all allegations of harrasment/intimidation, meaning the current prima facia threshold. You also talked a little bit about ADR in your comments.

Could you articulate a little more of whether you think ADR would in fact separate some of these issues out, as Mr. Beedle has mentioned, that are mistakes from those that are, indeed, more serious allegations that we would need to track down.

MS. BILLIE GARDE: Well, there's two aspects of any allegation or retaliation. The first deals with the person who is alleging that he or she is retaliated against, whether that has resulted in a lawsuit or a complaint to the NRC. And in those cases, where such an individual employee has an issue, I think ADR is a viable, generally a very useful tool in order to resolve

individual differences. And I wholeheartedly support it.

Remember, not all claims of allegation or retaliation go to the Department of Labor. And there are a lot of reasons why employees don't go to the Department of Labor. For example, in the case that lead to the Exelon Order, that employee never went to the Department of Labor for very personal reasons that had absolute nothing to do with him not believing he was retaliated against. And so to put the onus completely on the employee in terms of looking at it that narrowly is a mistake.

The other aspects that get the NRC into it in the first place is, in the context of the individual action that lead to the retaliation claim, the NRC may very well need to do something about that incident.

My personal opinion is that the utilities and licensees should be able to respond to issues of retaliation, regardless of the merits of the claim, and regardless of the outcome of ADR or litigation, immediately, promptly.

We don't need to wait for an eighteen month

NRC OI investigation for an individual supervisor who stood up in front of a group of engineers and said, never write a nonconformance report again, to solve that problem.

That has to be solved that day, the next day.

And I think what happens is that these processes give -- put so much additional baggage on handling the incident that it doesn't get handled. That part of it does not get handled on time.

Using ADR to solve the individual claim? Absolutely. I think it's a good tool and it should be utilized.

COMMISSIONER JEFFREY MERRIFIELD: What would envision is the NRC participation in those proceedings?

MS. BILLIE GARDE: in the ADR proceeding?

COMMISSIONER JEFFREY MERRIFIELD: Yes.

MS. BILLIE GARDE: Well, from my perspective it's simply the same role that they have in the context of settlement, that is, in assuring that nothing in the ADR prevents the free flow of information to the government. So there's no gag order, nothing that gives the employee a reason to give up his rights to pursue

the safety related issue, or in any way stifles that.

And I think that the rest of it is a personal remedy issue between the employer and possibly the licensee, if the licensee isn't the direct employer, if it's a contractor, and the company, not in the individual.

COMMISSIONER JEFFREY MERRIFIELD: What Mr. Lochbaum has suggested is that the NRC be an equal participant to the alleger and the utility.

MS. BILLIE GARDE: I don't think the NRC should be an equal participant. I think the NRC's job is to make sure the safety issues are addressed and the safety conscious work environment implications, or the chilling affect implications, are addressed and that there's nothing that comes out of the ADR that won't stand public scrutiny in terms of some type of gag order.

COMMISSIONER JEFFREY MERRIFIELD: You obviously were one of the key people in Little Harbor.

And I was wondering if you wanted to talk a little bit about some of the thinking that you all had at that point on performance indicators.

You talked a little bit about it today. And I wonder if you could touch on those issues.

MS. BILLIE GARDE: Well performance indicators, I think there was a question of could you give them to us today. They really have to be tailored to the individual site and the individual situation. But it is a combination -- I don't want to say fairly easy, because sending down the right performance indicators takes time and understanding.

Little Harbor didn't even start writing the performance indicators for Millstone until we had a sense of what was out there, until we did our structured interview surveys, measured what the issues were, which is something we've done at other places, and then came up with the goals and the objectives to measure.

So it is an interactive process. But, for example, training, all training -- Millstone required training. What they found was that, as they were bringing in new managers and supervisors and scheduling them for training, they were in a decision making mode for months before they actually sometimes got to the training. So incidents of retaliation were occurring

within weeks or months of a new supervisor arriving and not understanding the new expectations. So they developed Quick Star Training. No supervisor lasted at Millstone, I think, longer than 72 hours without going through a Quick Start issue. But it's site specific, it's issue specific.

Davis-Besse would have much different performance indicators than Millstone. Millstone had overt harassment and intimidation. That doesn't appear to be a problem at Davis-Besse. At Davis-Besse it's a cultural issue of not raising concerns.

That's why I said it should be results oriented. The NRC should have a set of expectations. The utility or the licensee needs to write what performance indicators it needs in order to achieve its objectives.

COMMISSIONER JEFFREY MERRIFIELD: Going to Mr. Lochbaum, like Mr. Beedle, there are times when we agree and times when we disagree.

In the initial part of your presentation, I think, could be characterized as labeling our senior managers as engaging in some sort of Machiavellian

COBOL. And I'll rise to their defense in this regard. And I think there was a significant base of information provided by the work that the Discrimination Task Force did for them to come ahead to make separate recommendation to the Commission.

We as a Commission receive -- virtually every paper we get is subject to a process in which our senior managers look at and make an independent evaluation, without going back and doing the individual meetings that the staff as a whole have done. So I think you were unfair in making those characterizations of the staff in that regard. I think there were a lot of things they had to work with.

Ultimately, the recommendation they are making doesn't seem to be getting a lot of traction on this side of the table. But the recommendation they were making was that we go ahead and go with the rule, which would, of course, be subject to significant public comment before we would go final with that, even if we were to accept it.

DAVID LOCHBAUM: I think the point I tried to make was, if that was the path taken, why should we play

in that? We've been shown that, after two years of public engagement, all the effort and input that went into that was just rejected, thrown out the window, and something else brought out of the closet --

COMMISSIONER JEFFREY MERRIFIELD: I would disagree with that characterization, David. I mean, you say everything that went into it. You know, the Senior Management Group -- we don't need to go into great detail on this, but it took all of that information that the Discrimination Task Force had and just came to a different conclusion.

That doesn't throw out the notion that there were significant meetings and a lot of interaction, a lot of issues that were discussed that proved to be what they based their decision on. You and I can take a look at the same transcript and come to highly different conclusions on it. That doesn't necessarily make one good and one bad.

DAVID LOCHBAUM: but if we go into a public rule making process and we have all of those interfaces, senior management can still come to a conclusion and reject every one of those notions. So we don't have any

confidence, in that process, coming out with an outcome that would -- may not even be one.

We think processes can be fair even when they come to outcomes we don't agree with. This is one where we've lost confidence in NRC Management to do that.

We don't think that this is one, regardless of the outcome -- even if they come to the conclusion that's exactly what we say, we think that process is corrupted and won't come to that conclusion. And we won't support it, even if it agrees with us, oddly enough.

COMMISSIONER JEFFREY MERRIFIELD: I want to get to your proposal though. We talked a lot about the issue of ADR. That's one, in earlier conversations that we've had that was not something you had been as open to. It seems to me your position may be a little bit different than some you've talked about in the past.

And I'm going to the issue of having ADR prior to an OI investigation, if the parties occur. What do you foresee how that process is going to work? I mean, what would the standards be? What would be the specific involvement of the agency? How would we actually -- how

would our staff actually participate?

DAVID LOCHBAUM: I'm glad you asked that question, because I didn't mean to imply that we thought that the NRC, once that ADR started, was an equal participant at the table. We don't think that's necessarily a part of the process. It could be, but we're not necessarily advocating that has to be it.

We do think it's important the NRC, the plant owner, and alleger agree to go down that path before it's started. But once that path is started, we don't necessarily have to have a role for the NRC staff in that process until its end. Again, if the parties thought that was the best way to do it, we wouldn't be against it.

I think that the elements of it that we think are important are what you said at the first panel, communication. I think with communication comes emotional attachment. A lot of times, both sides get so entrenched or so emotionally attached to positions that can be a barrier to communication.

There's an aspect of the DPO process that NRC has that, we think, could be used. Again, that wouldn't

have to be the only one. That being where the alleger and the plant owner nominates somebody to be on that ADR panel, whatever you want to call it. And that becomes the advocate for the alleger, who champions the issue, perhaps without the emotional baggage that comes along with that.

So we think those kind of elements would lead to a better communication and hopefully a resolution of the issues at a lower profile than it takes otherwise, would be why we think it's important at the front end.

We still don't like ADR at the back end. We don't think that's an appropriate use of the process, but on the front end to get less cumbersome issues for all parties. We think that's a good application.

COMMISSIONER JEFFREY MERRIFIELD: Thank you, Mr. Chairman.

CHAIRMAN RICHARD MESERVE: Thank you.

First Mr. Lochbaum, let me just say that I join Commissioner Merrifield in disagreeing with the first part of your comments. I think that the Commission is served when we get a diversity of views, including from you and from industry and so forth, and

that senior management is here in order to provide us with their best advice as to how we think we should revolve an issue. And we reserve the right to go the way that we deem as appropriate.

And let me say in this process, the work of the Discrimination Task Force, as was demonstrated this morning, was certainly not thrown out. That material was all provided to us, provided to you. They were at the table, they were describing what they've done for us.

So I think that senior management was doing exactly what they should do in providing us with their input along with all the other inputs we get in making our decisions.

DAVID LOCHBAUM: I recognize I'll be outvoted on this one. But I'm going to stay the course.

CHAIRMAN RICHARD MESERVE: I do have a question for you, however. You indicated that there were a few aspects of what the Discrimination Task Force came out with in which you agree or disagree on. You don't agree with the changing threshold, exploring ADR, that we should sanction individuals as you mentioned in

your talk.

There were a whole range of other recommendations that were made to us as a part of Option Four, resequencing the investigation, changing the way we do it, releasing the OI report, and so forth. Do you support the other changes? I mean, there were a variety of other recommendations that have been made.

I was just curious to -- and I'm going to ask others of you the same question.

DAVID LOCHBAUM: I think in general Option Four, the streamlining mechanisms, we're in general support of. I think we agree that that's probably the one area that most stakeholders agree on, that timeliness is a problem. And from what we've seen of those options, they seem to be fair to the extent possible to all parties that are engaged in that process.

We think those are good ideas.

CHAIRMAN RICHARD MESERVE: Ms. Garde, you might have some comments, as for being very much in this process, about other aspects of the threshold and streamlining issues. I realize you're headed in a

somewhat different direction, but it might be helpful for me to know what your views are on those recommendations from the Discrimination Task Force.

MS. BILLIE GARDE: I think the resequencing and the release of the OI report are good ideas. I think a lot of thought went into that. And if that's the way you end up going, I think you could adopt most of those recommendations.

I have a little bit of a different view on this threshold issue, which is pretty tied, basically, to my recommendation on safety conscious work environment, because I think a threshold for OI investigations really turns on whether there's the element of intent obvious in the beginning.

It's very easy to make a prima facie case of retaliation. But the intentional decision to proceed with a retaliatory act in the face of a process that should have prevented it, I think, raises the level to where it should be.

But that would require that you had an internal safety conscious work environment process and a executive review board process that basically reviewed

those decisions before they ever got to the NRC. So that's a little bit more complicated then just giving a yes or no answer.

CHAIRMAN RICHARD MESERVE: Mr. Beedle in his comments suggested that some of the things that you've described as being important for the licensees might be something that could be considered as best practices as part of further guidance that comes out of the implementation of the policy statement, the '96 policy statement.

Is that an alternative to a rule, or is that an appropriate alternative to a rule from your perspective?

MS. BILLIE GARDE: I think the NRC has sufficient tools on the books, if it would use that policy statement as part of its inspection module and enforcement policy in a much more aggressive way than it has been using it. And by that I mean actually expecting each company to demonstrate how it's meeting the policy expectations set out. You probably want to revise them, but essentially it's set out in the '96 policy statement.

It does not currently do that. And I don't find, as a general rule, that licensees are putting together those kind of programs in the absence of regulatory scrutiny or public oversight.

So can it be done? Yes.

Are the tools there to do it? Yes.

But I think it would take a revised approach to the way these things are being utilized at present.

CHAIRMAN RICHARD MESERVE: I'm sure you appreciate that it's hard for us to say we're enforcing something that isn't in the statutory rule.

I understand your statement to say that you think if we're really going to be doing this as part of an enforcement process, we would need a rule.

MS. BILLIE GARDE: That's what I'm saying.

CHAIRMAN RICHARD MESERVE: Mr. Beedle, question, first of all, about Option Four and the various other things, if we decide we're going to pursue that route. There were a series of recommendations that were made to us. Do you have any reaction to those?

RALPH BEEDLE: Well, I agree, that streamlining, releasing reports, they're processes

issues as to how you're executing that function. And clearly there's a need to change some of the processes to improve the efficiency and to reduce the time it takes to reach a conclusion.

But I think more importantly, the issue of how the OI organization conducts these investigations is a real issue. I mean, I don't like to see it take eighteen months or two years to get to a conclusion.

But more importantly is the affect that it has on the staff in the process of doing that. It truly turns out to be almost a criminal investigation with the intent that everybody that's talked to is a criminal. And it's an extremely unnerving kind of a process.

Just the fact that OI calls one of my staff members -- and I'm not even a licensee -- sends tremors through the organization; why is OI in here investigating us, what's the outcome, and when are you going to go to jail, and how big is your fine?

It does have a devastating effect. And that has been our principle concern with the way OI is doing these investigations from the outset.

So process is important. But more importantly

is the mechanism and the attitude which OI undertakes those investigations.

CHAIRMAN RICHARD MESERVE: Do you have any comments or a response you would like to make to Ms. Garde's observations about how to really do this?

And the response she's just given me, at least as I've understood it, is to really have this be effective there needs to be some regulatory foundation for it.

RALPH BEEDLE: Well, I think you're also -- I mean, you've always got this problem that if you're going to issue a civil penalty, you have to have some sort of regulation on which you're basing it.

I don't know that any licensee regulated by any agency wants to be in a position where it's subject to judgment on the part of the regulator as to whether or not they violated something. And so I would agree with Billie that that is kind of a foundation that your regulatory process is built on.

I think you've got plenty of regulatory tools to deal with the licensees. And if every one of these cases where there's a problem with safety conscious work

environment, safety culture, all of those manifest themselves as failure to follow some regulatory program that you've already got well established.

Davis-Besse, for example, you have a clear expectation that they control boric acid control and erosion at the plant. I mean, safety culture is probably what got them there. And I suspect that's ultimately what's going to ultimately be the case.

But the regulatory problem is that they didn't do what they should have done with regard to our regulatory progress, not the fact that there was some requirement that says you've got to have good safety culture.

CHAIRMAN RICHARD MESERVE: But that, to me, is where the issue is. It's how you start, say there was a safety culture problem, we didn't have a way to get to that before we knew there was a problem. And if there's some means to have dealt with the root cause through the outset, we would have all been much better off.

RALPH BEEDLE: Well, I guess we could probably investigate whether or not the agency knew there was a safety culture problem before they knew there was a

problem with some violation of the regulations. I mean, we talked about that.

CHAIRMAN RICHARD MESERVE: If you don't look for the safety culture problem, we're certainly not going to find it. That's what the argument is here.

RALPH BEEDLE: Most of the regional administrators that I've talked to clearly recognize when there are safety culture issues at the plant. And what they end up doing is they kind of nip around the edges looking for that regulatory lynch pin to go after the plant because they know there's safety cultures. So they look for the regulatory problem to go in there and get the company's attention.

CHAIRMAN RICHARD MESERVE: I don't think you're making the argument you want to make.

MS. BILLIE GARDE: You're making my argument.

CHAIRMAN RICHARD MESERVE: You're making BILLIE Garde's argument.

RALPH BEEDLE: Well, no. We're talking about whether or not it's right that safety problems are recognized at the plant. And I think they are. I think the staff sees those. But, again, it's kind of a

subjective thing.

I mean, I think there's a safety conscious problem here at the NRC. does that mean that there is? What's my evidence? How do I go about proving it? It becomes a difficult kind of a challenge to do that.

I think the regional administrators have the same difficulty. So what they're looking for is evidence, in a performance area, to prove to themselves that they, in fact, are looking at a safety conscious work environment or a safety culture problem.

MS. BILLIE GARDE: Commissioner, if I could, the indicator that you're looking at, the closest thing you've got to a safety performance indicator is the statistics you've got on allegations received. So for Davis-Besse we have five in '97, four in '98, three in '99, none in 2000, two in 2001.

If that's the only indicator you're looking at, you're going to conclude there's no safety problem here because there's no allegations. That's not enough. That's not a broad enough look at what the issues are to determine that.

DAVID LOCHBAUM: If I can just help out Ralph

for just a minute as a going away gift. If you had this rule, I think the question is, could the inspectors have found the safety culture problems at Davis-Besse before they found the Boric Acid Corrosion Program.

The Boric Acid Corrosion Control Programs was very objective and was missed. The safety culture issues are very subjective. So if you miss the easy things to find, why would the harder ones be found first?

COMMISSIONER EDWARD MCGAFFIGAN: I'll just add that Billie gave you some statistics.

The discrimination allegations at Davis-Besse were zero in '98, zero in '99, zero in 2000, one in 2001. So if you're just looking -- if this is focused on safety conscious work environment versus safety culture, there's a point that Commissioner Merrifield made. This is a best performer.

MS. BILLIE GARDE: Absolutely. It's not enough.

RALPH BEEDLE: Well, I think it would be a grave mistake to look at the presence or absence of allegations or discrimination charges as an indicator

solely of the safety conscious work environment. I don't think either one of the three of us would ever support that. I don't think anybody in the agency would support that. At least I hope not.

CHAIRMAN RICHARD MESERVE: I've absorbed too much time. Unfortunately, I've absorbed some of the time that Commissioner Dicus was intending to use.

She asked me to express her apologies, that she has another commitment and has had to leave.

COMMISSIONER NILS DIAZ: Thank you, Mr. Commissioner. I think my fellow Commissioners have already exhausted the list of issues.

But let me go back to what I see is the issue that we need to resolve, the issue of preservation. We have to be very careful with this. We actually are asked to observe the right of the licensee to manage the plant and to manage the safety of the plant, including you know, satisfying the regulatory framework. That's obviously an issue.

We also need to preserve the right of employees to rate real and significant safety concerns. The issue is, how do you manage those two things. And I

don't think that anybody has an answer for how to manage that. So I still believe that adding regulations to a complex issue might make it even more complex and difficult to manage. And so I'm very concerned about providing a rule.

Having said that, I think that you all have made very good comments. I would like to add, Mr. Lochbaum, my support to Commissioner's Merrifield and the Chairman.

DAVID LOCHBAUM: Where is this woodhouse, woodshed?

COMMISSIONER NILS DIAZ: I'm still going to say, we really need, I personally think we need the senior management to be involved in the processes and to provide the Commission with their senior management views, opinions. And in this case, there happens to have been a change.

I might disagree with the conclusion. I my even disagree with the process. But I fully support them getting in, you know, fully into the issue and providing us with their views.

And I think we have so many checks and

balances in all of these process, including, hopefully the Commission, that any implications that the process was not fair and not considering the public stakeholders doesn't hold through as an agency. So let me just stop right there. I know you have different opinions.

You actually have touched on the issue of training. And I think the issue of training becomes sometimes part of the implementation of a policy or something that will substitute for the rule.

Mr. Lochbaum, do you think we should mandate training?

DAVID LOCHBAUM: We submitted a petition to that affect.

COMMISSIONER NILS DIAZ: I know. Do you still think so.

DAVID LOCHBAUM: If the NRC would do the three steps we outlined, we would withdraw the petition tomorrow or the day after you do those three steps.

COMMISSIONER NILS DIAZ: three steps as you align them?

DAVID LOCHBAUM: Or something close to that even.

COMMISSIONER NILS DIAZ: so why can't you do that, if training seems to be a fundamental issue that was brought out by Millstone and people think that would actually contribute to having the awareness and the cognition of employees and employers of, you know, how deal with this issue?

How can you quickly withdraw that? That was really my question, by the way.

DAVID LOCHBAUM: I think I agree with Ralph in this regard. We've had several mentions today of plants that had safety cultural problems. It's been a relatively short list. I don't think there's a list of twenty plants behind that we can all fill it in with. So I don't think it's a widespread problem. Therefore, most of the plant owners are able to provide that environment or either doing the training now themselves through programs or achieving that, how ever they're doing it. So the training wouldn't address, except for a few outliers --

If you enforce those three steps that we've outlined, that provides the incentive for the plant owners that are not achieving that result to provide the

supplement or whatever, fix whatever is not leading to that outcome to get to the outcome. So they would essentially be like Exelon in upgrading their training to get there.

COMMISSIONER NILS DIAZ: Thank you.

Ms. Garde, there's been some comments regarding the fact that we are different from other agencies.

You actually aid we were better than other agencies.

Thank you for those comments.

Do you believe that eliminating or changing significantly the way we deal with harassment and intimidation issues will level the playing field?

MS. BILLIE GARDE: Level the playing field for who?

COMMISSIONER NILS DIAZ: for the industry, for the stakeholders, for whoever is actually looking at it?

How do you, you know, support actually making significant changes unless you're trying to achieve some level playing field in whatever stance you're coming from?

MS. BILLIE GARDE: If you're talking about leveling, putting the NRC at the same level as other agencies, I think they are far behind you and going in your direction. And I think that they look to this industry as the industry that has the most experience in dealings with these issues.

For example, I do a lot of work with the pipeline industry. They're just now getting a pipeline whistle-blower protection bill. They are looking at the NRC to follow this model. So I don't think that you want to level it in that way.

COMMISSIONER NILS DIAZ: How about from the industry? Is there a point that they are submitted to standards that are not used for other industries?

MS. BILLIE GARDE: Well, the Office of Investigations is unique to the NRC. And as a lawyer, I have a lot of difficulty with the method by which OI conducts its investigations in the context of what happens as a result of that investigation, where they actually will find an alleger or find a manager guilty for which he can both lose his livelihood and, in theory, be criminally prosecuted without him having an

opportunity, during the investigation, to really defend himself. OI has a tremendous amount of power in that context.

And I know I have spoken about this quite a bit, even though I always represent the employees in these issues, OI's process needs to have some fundamental fairness put into it because the rule of an OI information that concludes a person engaged in harassment and intimidation is the end of that person's career.

And giving them a postinvestigatory finding hearing, which they don't really have much control over -- the licensees usually settle those cases. That's the end for that person. And that process bothers me as an issue of fundamental fairness and needs some work. Which is why, from my perspective, changing that threshold to a point where there really is evidence of an intentional notice with full notice training.

That's kind of how you got into the recommendation for training, which is you wanted to remove the ignorance argument from the supervisors, so giving them all opportunity to do the right thing.

If they then still, in the face of, for example, an executive review board and full training, make the decision, get rid of this guy, then I think an OI investigation is deserved.

COMMISSIONER NILS DIAZ: You have a comment on the training issue. You see that as something that industry could support, or you see it as important, or are you seeing that as a distraction from the management viewpoint?

RALPH BEEDLE: Well, it's clearly important, Commissioner. I don't think there's anybody that would argue that training is something that is needed.

I mean, it's easy to fall into some traps just because of human interactions in these situations, between a manager and an employee, that would put you at odds in a discrimination situation. It's the offhand comment or the comment that's made to one employee overheard by somebody else and taken out of context. See you have to be continuously concerned about that, not only with this but also in the other forms of protected activity that we deal with as managers and employees.

So training, I think, is an important element in this process.

COMMISSIONER JEFFREY MERRIFIELD: May I ask a follow up question?

Ms. Garde raised something. One of the concerns that gets raised is, they don't want to -- you know, some people don't a rule imposed on training because that gets to descriptive. We're telling utilities how to train people.

You raised the question of people claiming ignorance; gee, I didn't really know this was an issue out there.

Can you get through that morass by saying, well, rather than imposing training requirements, we would propose that managers and line managers certify that they've been trained, i.e., take that ignorance question off the table.

I mean, if utilities believe they can do a good enough job in training people, would they be willing to stand behind that training?

MS. BILLIE GARDE: I don't know if there would be willing to stand behind that training. There's lots

of training. Some of it's not very good. Some is excellent. But I think the UCS'S petition for rule making was right on in that point.

And having played in this field for a long time, I will tell you that training managers and supervisors is the single most important thing you can do to change the face of this problem for the agency, because I can't tell you the number of times it's actually in the deposition when I ask the supervisor, did you understand that you couldn't order that employee not to not go through the chain of command.

They'll say, no, are you kidding, of course I can, I'm the boss, I can tell him that he can't go to the NRC.

COMMISSIONER JEFFREY MERRIFIELD: Did you want to comment?

RALPH BEEDLE: Well, Billie made a comment that if we had never had the problem I wouldn't have to deal with some of these discrimination cases. I think that's almost unrealistic.

You know you've got thousands of people out there, and these situations are not all categorized as 1

through 100, if you memorize those you'll never have a problem.

No. Everyone appears to be unique and a little bit different. Training and principles, I think, certainly helps.

As long as we accept the defense of ignorance, you'll get ignorance as the defense. And, you know, Ignorance of the law, I mean, I used to tell the police officer, I didn't know that was a 25 mile an hour speed limit. He says, well, you were doing 27, here's your ticket. Ignorance of the law is no excuse.

So this ignorance thing begets a real complicated sort of a process where we have people go to training, sign affidavits, prove that you do it, all in order to disarm someone from an ignorance offense. I don't think it's fruitful to go that way.

Training, I think we're trying to get the industry to move in the right direction in terms of training. And I think the Exelon example will probably result in more facilities looking harder at some of their training programs.

But back to the problem that we're trying to

solve, we are not dealing with a major issue for the industry or the agency. The numbers don't suggest at all that we're dealing with something that is of major importance to the industry.

COMMISSIONER JEFFREY MERRIFIELD: I'm sorry. I've treaded on Commissioner Diaz's time. But I'll say this. When I came on board to this Commission in 1998, Millstone was a major industry. The numbers may be small, but it gets us on the cover of "Time" magazine.

CHAIRMAN RICHARD MESERVE: Mr. Diaz has indicated that he has to leave.

COMMISSIONER EDWARD MCGAFFIGAN: Thank you, Mr. Chairman. I'll try to be brief. I know we've gone over.

Mr. Beedle, congratulations! Good luck. I, like everyone else, I think you're a very effective advocate for your industry, even if I didn't always agree with you.

Mr. Lochbaum, consider dido on this side of the table. I don't think there's a deceitful bone in Bill Kane's body. They knew the process we were going to go through was going to be an open one. We were

fully intending to put their paper out while we voted on it. We told people, we told Billie Garde that was going to happen.

I think your only problem is maybe Billie Garde had more influence than you did since she lead them down the primrose path to making a recommendation that may not win a whole lot of approval on this side of the table. So consider me dido there.

The one issue on safety cultural safety conscious work environment, there was a discussion earlier when the Chairman was asking questions of Davis-Besse. It was a safety culture issue. It wasn't a safety conscious work environment issue. It was the incentives that they had were very much oriented toward production and not safety.

It turns out -- and I think IMPO has apparently written about this, the press has written about it, that, you know, it was a totally penny wise pound foolish approach to things and perhaps IMPO's own jaw boning and their rate of involvement in safety culture precludes the need for us to have a rule.

But if there's a rule that's come to me out of

the Davis-Besse situation, it would have us involved in looking at what people get bonuses for at the plant and if the bonuses are heavily heavily skewed toward production.

A normal human being following the incentive system will do bad things. You can imagine the rule. I don't particularly think I need to do that rule because as I say, I think the IMPO safety culture work and the fact that Davis-Besse is a colossal mistake that everyone recognizes in terms of its incentive structure, it will be a lesson learned, at least for a fair number of years. And since I don't know how to write that rule anymore than I know how to write the safety conscious work environment rule, I probably won't go into rule making.

But to go into Mr. Beedle's point, the median number of discrimination cases in this industry is zero in a given year. The average number is less than one. And it strikes me that, you know, it is a problem at relatively few places. Paul Blanch -- and I might ask that we put his letter of December 12th to be part of this meeting. But Paul Blanche basically comes in and

endorses David Lochbaum's view that we have the tools and we just have to use them in the limited number of places where it comes up.

We're unlikely to be proactive. But I have doubts that we would be proactive, even if we had an elaborate rule. And if you have any comment, Ms. Garde, since you're the advocate of the rule on the other side of the table, I would be happy to hear.

MS. BILLIE GARDE: Well, respectively, I think you're wrong. I think, absent a rule, that we'll be back here and I'll have another stack on this pile in another three or four or five years with essentially the same question.

And as I said before, it's not that I don't think it's achievable. I think there are the tools that it could be done without rule making. But that hasn't happened. And at this point I just can't imagine -- even the Davis-Besse situation is going to result in sufficient changes that we won't just repeat ourselves.

COMMISSIONER EDWARD MCGAFFIGAN: I'll sort of give Greta Dicus, in absentia, the last word here. I think, in the implication of her question earlier, the

notion of a safety conscious work environment that would apply to all licensees in some sort of graded fashion, when with materials licensees you have minuscule numbers of cases and very large numbers of licensees. Then we have to deal with agreement states and figure out how they would implement, in 32 agreement states, this rule.

There's a massive amount of work for a minimal amount of benefit, it strikes me. And I don't know whether you've ever dealt -- I guess you had one materials licensee in Texas you mentioned, probably a Texas agreement state licensee.

But based on one case I'm not one to do a rule. So maybe I will take the last word, but you have every right to disagree with me. And I welcome the disagreement.

CHAIRMAN RICHARD MESERVE: I would like to thank everyone who has spoken with us this morning. This is obviously a very challenging area, and the discussion this morning was very illuminating.

With that, we're adjourned.

<Whereupon, at 12:30 p.m., the Commissioner's Hearing adjourned.>