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FINAL REPLY:

David Lochbaum
Union of Concerned Scientists

TO:

Commission

FOR SIGNATURE OF : ** PRI ** CRC NO: 03-0626

Chairman Diaz

DESC:

Alternative Dispute Resolution for Discrimination Allegations

ROUTING:

Travers
Norry
Paperiello
Kane
Collins
Dean
Burns
Dyer, RIII
Cyr, OGC

DATE: 09/29/03

ASSIGNED TO: CONTACT:

OE Congel

SPECIAL INSTRUCTIONS OR REMARKS:

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AUTHOR:	Mr. David Lochbaum		
AFFILIATION:	UCS		
ADDRESSEE:	CHRM Nils Diaz		
SUBJECT:	Concerns alternative dispute resolution for discrimination allegations		
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Union of Concerned Scientists

Citizens and Scientists for Environmental Solutions

September 16, 2003

Dr. Nils J. Diaz, Chairman
Mr. Edward McGaffigan, Jr., Commissioner
Mr. Jeffrey S. Merrifield, Commissioner
United States Nuclear Regulatory Commission
Washington, DC 20555-0001

SUBJECT: ALTERNATIVE DISPUTE RESOLUTION FOR DISCRIMINATION ALLEGATIONS

Dear Chairman and Commissioners:

By letter dated September 8, 2003, Ms. Annette L. Vietti-Cook communicated to Dr. William D. Travers your directions regarding the issues in SECY-03-0115. Protection for nuclear power plant workers who raise safety concerns has long been and remains a top priority for the Union of Concerned Scientists. As we understand your directions, the NRC staff is to develop guidance for a pilot program to "road test" an Alternative Dispute Resolution (ADR) process in handling discrimination allegations. We intend to participate in public forums provided for this pilot program and submit these comments now for consideration by the NRC during development of guidance documents.

First, we hope that your instruction to the staff that "*The screening process is unnecessary and any internal handling of the allegation beyond determining whether the alleger is aware of and wished to use a licensee's ADR program would seem to take away from the benefits of ADR*" is in context of initial or concurrent work by the Office of Investigations and does not extend to efforts undertaken by the NRC staff to determine if there are unresolved safety issues associated with allegations of harassment and intimidation. The ADR process must not be a barrier to NRC oversight of safety issue resolution. We assume that the NRC staff will remain free to pursue inquiries into potentially unresolved safety issues in parallel with any ADR activities.

Second, we assume that the ADR process developed by the staff will not compromise administrative controls that protect the identity of allegers. The NRC made substantive progress in this important area since the Congressional oversight hearings of 1993 and must avoid any backsliding. As we understand the ADR process, it would be an option if and only if both parties (i.e., the alleger and the licensee) mutually agreed to it. The NRC staff should apprise allegers of the options for processing allegations (i.e., ADR and non-ADR routes). Only after the alleger – having been fully apprised about the impending loss of confidentiality – formally agrees to pursue the ADR process should the NRC staff contact the licensee to determine if mutual agreement can be reached. Such sequential polling for interest in the ADR option permits mutual agreement to be reached, if it can, with the informed consent of the alleger as to loss of identity protection.

Third, we are concerned about the ADR process being abused by some licensees as the means for informally identifying potentially collaborating materials so that they can be "purged" or "sanitized" before

Washington Office: 1707 H Street NW Suite 600 • Washington DC 20006-3919 • 202-223-6133 • FAX: 202-223-6162
Cambridge Headquarters: Two Brattle Square • Cambridge MA 02238-9105 • 617-547-5552 • FAX: 617-864-9405

before the Office of Investigations gets involved after the ADR stalemates and ends. If the allegation is valid and wrong-doing has occurred, the ADR process could become an excellent vehicle for previewing the derogatory evidence and enabling its untimely destruction. Records retention requirements and 10 CFR 50.9 applicability during the ADR process are uncertain, but appear to be significantly less rigorous than during the current non-ADR process. We recommend that, as a minimum, the ADR process be required to maintain an index of documents cited and relied upon so that the NRC may inquire about any losses should an Office of Investigations inquiry ensue.

Fourth, we are concerned about the end game when the ADR process fails to reach a mutually agreeable settlement. For example, the current enforcement policy contains a two-year window where past offenses of a similar nature can lead to "upgraded" sanctions. The time clocks and/or durations for collateral regulatory processes may need to be adjusted to account for the time devoted to the ADR effort. We understand that the 180-day clock in the Energy Reorganization Act as amended cannot be "suspended" or "paused" while ADR is pursued. The NRC must take care not to "encourage" allegers unknowingly into a process that jeopardizes their legal rights.

Fifth, we are concerned about the end game when the ADR process succeeds in reaching a mutually agreeable settlement. The NRC staff must receive sufficient information about the matter to be able to monitor conditions at the nuclear facility. For example, a number of successful ADR outcomes from the same group at the same site might prompt the NRC to probe whether further regulatory actions outside of the allegation/ADR process are warranted.

We admit to not being a big fan of ADR. But if the pilot program demonstrates that ADR improves the plight of workers who have raised safety concerns only to experience, or think they've experienced, retaliation for having done so, then we can and will become big ADR fans. Too many workers have suffered too much harm not to explore every avenue for reducing the number of victims and the magnitude of their damage. We truly hope this works and will do what we can to make it viable.

Sincerely,

David Lochbaum
Nuclear Safety Engineer
Washington Office