

AUG 16 2005

LR-N05-0406



U. S. Nuclear Regulatory Commission
Attn: Document Control Desk
Washington, DC 20555-0001

**RESPONSE TO REQUEST FOR INFORMATION REGARDING
IMPLEMENTATION OF THE EXECUTIVE REVIEW BOARD
SALEM AND HOPE CREEK GENERATING STATIONS
DOCKET NOS. 50-272, 50-311, and 50-354
FACILITY OPERATING LICENSE NOS. DPR-70, DPR-75, and NPF-57**

Reference: LR-N05-0160, Response to Request for Information Regarding
Implementation of the Executive Review Board, dated March 21,
2005

LR-N05-0226, Response to Request for Information Regarding
Executive Review Board Commitments, dated April 27, 2005

On March 21, 2005, PSEG provided information regarding an independent review of the implementation of the Executive Review Board (ERB). On April 27, 2005, PSEG provided a redacted copy of the independent review team report. This letter is in response to an NRC request to perform an additional review of the independent review team report and provide as much information as possible in an un-redacted manner. In support of that request, attached is the report that now includes material that was initially redacted. PSEG Nuclear has made a best efforts attempt to balance the legitimate need of personal privacy and preserving the confidential nature of the interviews while maximizing the information disclosed under the standards established in 10CFR2.390. Should you have any questions on this report or matter, please contact me at 856-339-1740.

Sincerely,

A handwritten signature in black ink that reads "Darin M Benyak".

Darin M. Benyak
Regulatory Assurance - Director

A001

REPORT OF THE INDEPENDENT REVIEW TEAM

I. Background

On January 7, 2005, Public Service Enterprise Group (“PSEG”) announced a series of personnel actions affecting three officers and various managers at the Salem and Hope Creek Generating Stations (“Salem/Hope Creek”). The plants’ Executive Review Board (“ERB”) did not review the personnel actions before their announcement or their implementation on January 14, 2005. Generally, the ERB’s Charter calls for the ERB to review such personnel actions before implementation and to either “object” or “not object” to the proposed action.¹ Given the absence of an ERB review, various plant personnel, including officers, managers, and others, questioned the process and the resulting personnel actions. Additionally, the Nuclear Regulatory Commission (“NRC”) asked PSEG to provide the reasons for not seeking an ERB review.

Accordingly, on January 31, 2005, PSEG informed the NRC that it was commissioning an independent review of the personnel actions.² To conduct this review, PSEG retained Mr. Hugh L. Thompson, Jr. of Talisman International, LLC, and Mr. Charles C. Thebaud, Jr. of Morgan, Lewis & Bockius, LLP (“Review Team”).³

II. The Independent Review Team Charter and Scope of Review

After appointing the Review Team, PSEG issued a Charter,⁴ which requests an independent review of the personnel decisions implemented on January 14, 2005. Accordingly, the Charter seeks answers to the following questions:

1. If any person adversely affected by the personnel actions engaged in protected activity, did that protected activity contribute, in whole or in part, to the personnel action?
 - If protected activity played a part in the personnel action, would the personnel action have occurred in the absence of the protected activity?
2. Did the personnel actions, or any of the circumstances surrounding the personnel actions, significantly impact the Safety Conscious Work Environment (“SCWE”) at the plants?

¹ ERB Charter, Rev. 0 (Exhibit 1).

² Letter from William Levis, Senior Vice President and CNO, to Samuel Collins, Regional Administrator, NRC Region I, “PSEG Metrics for Improving the Work Environment, Salem and Hope Creek Generating Stations, Quarterly Report,” Jan. 31, 2005 (Exhibit 2).

³ The resumes of the Review Team members appear at Exhibit 3.

⁴ Charter, “Review of PSEG Personnel Actions Implemented on January 14, 2005 at Salem Hope Creek” (Exhibit 4).

On February 17, 2005, the NRC sent a letter to PSEG requesting additional information about the personnel actions of January 14, 2005. Among other things, the NRC requested that PSEG provide the “cause(s) for the lapses in implementing the ERB process for personnel actions taken at the [Salem and Hope Creek] stations.”⁵ Discussions between PSEG and the Review Team confirmed that PSEG intended the Charter to address this issue as well. PSEG did not request that the Review Team conduct a comprehensive, site-wide assessment of the impact of the personnel actions of January 14, 2005, on the work environment at Salem/Hope Creek.

III. Executive Summary

On December 20, 2004, Exelon Corporation and PSEG announced plans to merge. As an integral part of the merger, the companies entered into an Operating Services Contract (“Operating Contract”) to improve performance at Salem/Hope Creek. Among other things, the Operating Contract provided for the installation of an Exelon Chief Nuclear Officer (“CNO”) and the assignment of unnamed Exelon managers into key management positions at Salem/Hope Creek “for the purpose of implementing Exelon Management Models, practices and supporting procedures in key operational areas. . . .” The Companies entered into this Operating Contract on the same day that they announced the merger, December 20, 2004.

To implement the Operating Contract, senior executives from Exelon [REDACTED] and PSEG [REDACTED]

[REDACTED] met in late-December 2004 and early-January 2005. [REDACTED] arrived at these discussions with an understanding of what he believed to be the principal needs of the station, and a preliminary list of experienced Exelon managers whom he had earmarked to assume key managerial responsibilities. [REDACTED] arrived at these discussions with an understanding of the strengths and weaknesses of the site, in general, and an understanding of the performance of key PSEG managers.

With this background, the executives discussed specific positions and personnel. Generally, the discussions led to decisions which fall into three categories. First, Exelon installed its managers in vacant PSEG positions. Second, Exelon installed its managers in positions in which PSEG incumbents were under-performing. Finally, Exelon installed its managers in key positions in which [REDACTED] believed that it was essential for Exelon to have an experienced manager familiar with the Exelon management model. In these collaborative discussions, PSEG executives provided candid assessments of PSEG managers so that [REDACTED] could decide whether to request the retention of a

⁵ Letter from A. Randolph Blough, Director, Division of Reactor Projects to William Levis, Senior Vice President and CNO, “Salem and Hope Creek Generating Stations – Executive Review Board Commitments,” Feb. 17, 2005 (Exhibit 5).

replaced PSEG manager. As a result, PSEG severed the employment of some of the replaced PSEG managers, while it retained other replaced managers. In one instance, Exelon chose not to replace a terminated PSEG manager, [REDACTED].

The decision makers based their decisions exclusively on these legitimate business needs and their understanding of the performance of the affected managers. Although all of the affected managers engaged in activity protected by 10 CFR § 50.7, that activity played no role in the decisions.

PSEG did not request a review of these personnel decisions by the ERB for four reasons. First, [REDACTED] understood that the ERB did not formally approve personnel decisions. Rather, the ERB process yielded either an “objection” or “no objection.” Accordingly, [REDACTED] had the authority to act independently. For that reason, [REDACTED] saw no purpose in requesting an ERB review. Second, [REDACTED] believed that the Operating Contract provided Exelon with the authority to install its management team. They believed that an ERB objection, if accepted, would run counter to Exelon’s contractual authority. Third, the personnel actions adversely affected the key members and participants of the ERB, rendering an objective review difficult, if not impossible. Finally, none of the decision makers believed that PSEG had committed to conduct an ERB review under the unusual circumstances presented. Accordingly, the companies implemented the changes without ERB review.

The personnel actions have not had a significant adverse effect on the safety conscious work environment at Salem/Hope Creek. The workforce remains willing to raise nuclear safety concerns. [REDACTED]

[REDACTED]. Those with this concern, however, have indicated that their concern is not so substantial that it would preclude or inhibit them from raising a nuclear safety concern.

IV. Conduct of the Review

The Review Team began its work by receiving an overview of the events surrounding the January 2005 personnel actions. The Review Team then gathered and

reviewed relevant background documents, including correspondence to and from the NRC, organizational charts,⁶ and the ERB Charter.

With this background, the Review Team conducted interviews of each employee who had been adversely affected by the personnel actions of January 14, 2005, the decision makers, and others with information relating to issues addressed in the Review Team Charter. During the course of these interviews, the Review Team also obtained other relevant documents.

The Review Team interviewed 31 persons, 23 of whom the Review Team interviewed in person. The remaining eight interviews were telephonic. Both Review Team members conducted 27 of the 31 interviews. Scheduling conflicts required that one Review Team member conduct the remaining four interviews.

Each interview began with the Review Team members identifying themselves and providing the interviewee with a brief description of their backgrounds. The Review Team then discussed the following topics with each interviewee:

- The purpose of the interview;
- The issues to be discussed;
- The Review Team's request that the interviewee review the typed interview notes for accuracy;
- The production of the Review Team Report to the PSEG Senior Vice President and General Counsel; and
- The probable disclosure of the contents of the Review Team Report, and possibly the submission of the Report itself, to the NRC.

Both Review Team members took notes during the interviews in which they participated jointly. Neither the Review Team, nor any interviewee, electronically recorded the interview. At the conclusion of the interview, the Review Team members discussed their notes with each other to ensure that their notes accurately reflected the interview. One Review Team member then prepared typed interview notes. As indicated, the Review Team provided these typed notes to the interviewees for their review.

During the course of its investigation, the Review Team had unrestricted access to all relevant personnel and files.

V. Findings

A. Chronology of Relevant Events Related to the Personnel Actions

⁶ Copies of the Salem/Hope Creek Organization Charts for November 8, 2004, and January 11, 2005, appear at Exhibit 6.

The following sections describe the events leading to the January 7, 2005, announcement of the personnel actions.

Pre-Merger Discussions and Other Relevant Events

In the Fall of 2004, Exelon Corporation and PSEG engaged in confidential discussions designed to explore the possibility of a merger between the two companies. During September 2004, the two companies also reached an agreement to exchange a small number of nuclear managers for the purpose, among other things, of developing the managers and enhancing the effectiveness of leadership and management at Salem/Hope Creek.⁷ Through this exchange, Exelon sent seven managers to assume positions of responsibility at Salem/Hope Creek.

On October 28, 2004, Mr. Christopher M. Crane, the Senior Vice President of Exelon Corporation and Chief Nuclear Officer of Exelon Nuclear, informed Mr. William Levis, who was then the Vice President, Mid-Atlantic Operations for Exelon Nuclear, that merger discussions between PSEG and Exelon were underway. From Exelon's perspective, the success of the merger depended, at least in part, upon the curtailment of any additional performance degradation at the plants. [REDACTED] Accordingly, Exelon and PSEG subsidiaries (Exelon Generation Company, LLC and PSEG Nuclear, LLC) negotiated an Operating Services Contract ("Operating Contract") that provided for the insertion of unnamed Exelon managers into management positions at Salem/Hope Creek "for the purpose of implementing Exelon Management Models, practices and supporting procedures in key operational areas toward the common goal of overall improved performance at Salem and Hope Creek. . . ."⁹

Mr. Crane informed Mr. Levis that, if the discussions culminated in a merger agreement and the related Operating Contract, Mr. Levis would become the Chief Nuclear Officer ("CNO") at Salem/Hope Creek. The executed Operating Contract specifically provided that Exelon would provide a person to serve as the CNO.¹⁰ Given these circumstances, Mr. Crane directed Mr. Levis to assemble a team of proven Exelon managers to assume key leadership positions at Salem/Hope Creek in accordance with the Operating Contract. Mr. Crane instructed Mr. Levis to assemble enough managers to establish a "critical mass," *i.e.*, enough managers to be able to improve station performance as soon as possible.

The confidential nature of the merger discussions, however, precluded Mr. Levis from disclosing his assignment to the pool of Exelon managers whom he was considering for positions. Nevertheless, Mr. Levis obtained an organization chart of Salem/Hope

⁷ "Straight Talk" from Chris Bakken, October 1, 2004 (Exhibit 7).

[REDACTED]

⁹ Operating Services Contract Between Exelon Generation Company, LLC and PSEG Nuclear, LLC, ("Operating Contract") at 1 (Exhibit 8).

¹⁰ Operating Contract) at 1.

Creek and, based upon his understanding of the conditions at the station, began to identify areas where new leadership could have a near-term, positive impact on performance. Mr. Levis had personal knowledge of the conditions at the site because since the Spring or Summer of 2004, he had participated in Management Review Meetings as a representative of Exelon, a co-owner of the Salem plant. In this role, Mr. Levis developed an understanding of the strengths and challenges facing the station, and he became familiar with many of the key PSEG managers. Indeed, as a co-owner of Salem, Exelon had a longstanding interest in the challenges facing the plant.

To identify the Exelon managers to accompany him if the merger talks were successful, Mr. Levis reviewed Exelon succession planning documents. He then consulted with other Exelon officers about the potential candidates. As he evaluated the needs of the station and the availability of Exelon managers, he determined that he would need approximately 24 Exelon managers to assume leadership positions at Salem/Hope Creek. [REDACTED]

Based upon his review, Mr. Levis formulated a list of Exelon managers whom he intended to approach to discuss possible service at Salem/Hope Creek. Again, however, given the confidentiality of the merger discussions, [Mr. Levis could not discuss these circumstances with potential candidates to determine their willingness to assume managerial positions at Salem/Hope Creek. [REDACTED]

Initially, [REDACTED] told [REDACTED] to have his team of Exelon managers on-site at Salem/Hope Creek on the day of the public announcement of the merger and to immediately assume their new managerial positions under the expected Operating Contract. On December 1, 2004, [REDACTED], met with [REDACTED] and [REDACTED] to discuss implementation of the expected Operating Contract. Among other things, they discussed the timing of the personnel moves contemplated in that agreement. [REDACTED] Recognizing that the merger discussions were proceeding towards a possible public announcement later in December 2004, [REDACTED] did not believe that re-start would occur during December, and he did not want to make key managerial changes, if possible, during the Hope Creek outage. Accordingly, [REDACTED] designate January 17, 2005, as the effective date for the Operating Contract. [REDACTED] [REDACTED] chose that

[REDACTED]

date because he believed that Hope Creek would be back on-line. [REDACTED] This delay also allowed Mr. Levis additional time to identify and relocate the Exelon managers who would be moving to Salem/Hope Creek. [REDACTED]

[REDACTED], [REDACTED], and [REDACTED] also discussed changes among the incumbent PSEG officers at Salem/Hope Creek during this December 1, 2004, meeting. Under the proposed Operating Contract, Exelon would install the CNO and, as noted earlier, Mr. Crane had chosen Mr. Levis for this position. This meant that Mr. Levis would replace the incumbent PSEG CNO, Mr. A. Christopher Bakken. Mr. Crane and Mr. Levis also indicated that Exelon would create two new officer positions – Site Vice President for Salem and Site Vice President for Hope Creek – and fill them with unidentified Exelon officers. [REDACTED]

On Saturday, December 18, 2004, [REDACTED], [REDACTED], met individually at the Hotel DuPont in Wilmington, Delaware, with the three adversely affected PSEG officers, [REDACTED], [REDACTED], [REDACTED]. [REDACTED], [REDACTED] disclosed the imminent announcement of the merger and the effect of the related Operating Contract on their employment with PSEG. [REDACTED]

Merger Announcement – December 20, 2004

On December 20, 2004, Exelon and PSEG announced their merger and the execution of the Operating Contract. Following the public announcement, Mr. Cassidy met with the Salem/Hope Creek workforce on December 21, 2004, in four “town hall” meetings to explain the merger and the Operating Contract. He followed up those meetings with a publication containing expected questions and answers about the effect of the Operating Contract on the PSEG management team. Among other things, he noted

[REDACTED]

that “in-mid January, Exelon will bring in a number of its management people” and that “numbers of displaced PSEG employees will be offered positions at other Exelon facilities. . . [,while] [o]ther displaced PSEG employees will be eligible for severance.”¹⁹

Initial Consideration of Management Changes – December 22, 2004

Two days after the public announcement, discussions began in earnest to implement the terms of the Operating Contract. On December 22, 2004, [REDACTED] met at Salem/Hope Creek to discuss potential management changes. By this time, Mr. Levis had assembled a list of available Exelon managers whom he had preliminarily earmarked for positions at Salem/Hope Creek. [REDACTED]

At this meeting, the three participants discussed a host of potential changes – some proposed by PSEG and some proposed by Exelon. The proposed changes fell into three general categories: (a) the filling of vacant manager positions; (b) the replacement of managers with performance issues; and (c) the placement of Exelon managers in positions having a high potential to improve performance in the near-term. For many, but not all, of the positions, [REDACTED] with the identity and background of the Exelon manager whom [REDACTED] was considering for a particular position. [REDACTED].

(1) Site Vice Presidents and the Salem Operations Manager

Consistent with this approach, Mr. Levis indicated that he would fill the two newly created Site Vice President positions with Exelon managers. Because the positions were new, the eventual selections of Mr. Tom Joyce (as Site Vice President for Salem) and Mr. George Barnes (as Site Vice President for Hope Creek) did not displace PSEG managers.²¹ Although Mr. Barnes and Mr. Joyce were aware of their consideration for these positions, they did not participate in any discussions concerning the replacement of PSEG managers in their respective sites. [REDACTED] Similarly, Mr. Levis proposed to fill the vacant Salem Operations Manager position with an experienced Exelon manager, Mr.

¹⁹ Straight Talk with Frank Cassidy, December 21, 2004 (Exhibit 9).

²¹ [REDACTED] assembly of his team occurred over a period of time, as he learned of the availability and willingness of potential members to serve at Salem/Hope Creek.

Tom Gierich. Mr. Gierich had previously served as the Operations Manager at Exelon's Byron nuclear facility.²³

(2) [REDACTED]

The discussions also addressed several PSEG managers whom one or more of the participants believed to be [REDACTED]. Specifically, [REDACTED] that PSEG would likely replace [REDACTED] Even before this meeting, [REDACTED] had concluded that he would need an Exelon replacement for this position. [REDACTED] Either by December 22, 2004, or soon thereafter, [REDACTED] identified [REDACTED]

(3) [REDACTED]

Similarly, the participants discussed the performance of [REDACTED]. Like [REDACTED] had discussed [REDACTED] with [REDACTED] in October or November 2004, well before [REDACTED] became aware of the possibility of any operating agreement with Exelon. [REDACTED] ([REDACTED] that he had with [REDACTED] in the Fall 2004 time frame. [REDACTED]) Based on his knowledge of the performance of the [REDACTED], [REDACTED] agreed that he would need [REDACTED]. [REDACTED] Recognizing [REDACTED]

[REDACTED]

[REDACTED] b1

(4) [REDACTED]

[REDACTED] also took this opportunity to place his two Exelon managers in [REDACTED] positions that had the potential to have a significant impact on the site's performance. Specifically, [REDACTED] knew that he needed to have new management in [REDACTED], given the [REDACTED] budget that the department would be managing over the next five years. [REDACTED] He considered it essential to get control of this large budget and to exercise better management in this area. [REDACTED] Accordingly, he chose to replace the incumbent PSEG manager, [REDACTED], with [REDACTED]

[REDACTED] joined in that decision and noted that, [REDACTED] [REDACTED] Indeed, [REDACTED] viewed [REDACTED] as one of the greatest challenges facing the site. [REDACTED] [REDACTED] also noted that his experience with [REDACTED] in several briefings had [REDACTED]

Given the importance of [REDACTED] installed [REDACTED] as the [REDACTED] – not a manager. And given the feedback from [REDACTED] about [REDACTED], as

[REDACTED]

well as overall concerns about [REDACTED] decided [REDACTED]
[REDACTED]

With the promotion of [REDACTED] to fill [REDACTED] position, a vacancy existed in [REDACTED] former position, the [REDACTED]. [REDACTED] placed his other Exelon [REDACTED] manager, [REDACTED], in that position. [REDACTED]

(5) [REDACTED]

Prior to meeting with [REDACTED] had also determined that he wanted to replace the incumbent [REDACTED]. He identified this need because [REDACTED] was one of the [REDACTED] focus areas for the ongoing Salem/Hope Creek Business Plan, and he wanted to have an Exelon manager in that position. Accordingly, [REDACTED] identified [REDACTED] as his new [REDACTED]. [REDACTED] had worked with [REDACTED] at the [REDACTED] and knew that [REDACTED]

[REDACTED] Having decided to insert [REDACTED] in that position, [REDACTED] on [REDACTED]. [REDACTED] did not know [REDACTED] and [REDACTED] did not view [REDACTED] believed that [REDACTED] [REDACTED] also recognized that generally Exelon performs very well in implementing [REDACTED], which was one of the areas of [REDACTED] responsibilities. As a result, [REDACTED] did not urge [REDACTED]
[REDACTED]

[REDACTED]

(6) [REDACTED]

Similar to the circumstances triggering [REDACTED] replacement, [REDACTED] had also identified an Exelon manager, [REDACTED], to play a key role in improving [REDACTED] – another of the ongoing focus areas in the PSEG Nuclear Business Plan. [REDACTED] [REDACTED] believed that more effective [REDACTED] would contribute significantly to better performance, and he knew [REDACTED] from [REDACTED] work at [REDACTED]. Additionally, [REDACTED] considered [REDACTED] addition to the Salem/Hope Creek managerial ranks as providing an added benefit [REDACTED]. Having decided to replace the PSEG incumbent [REDACTED], [REDACTED] again solicited feedback on [REDACTED] performance from PSEG. He learned from [REDACTED] that [REDACTED] had a strong background in [REDACTED]. Based on this input, [REDACTED] opted to retain [REDACTED], even though [REDACTED] had not identified a particular position for [REDACTED].

(7) [REDACTED]

The officers also discussed two potential moves in the [REDACTED]. Again, [REDACTED] had already identified Exelon managers for insertion into the organization. Specifically, [REDACTED] knew that [REDACTED]. He was also aware that Exelon had tried to get the PSEG incumbent, [REDACTED], to accept an exchange position with Exelon at its Peach Bottom plant [REDACTED], but [REDACTED] had declined. [REDACTED] had hoped to have [REDACTED] serve as [REDACTED].

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED], and [REDACTED] need for a person [REDACTED]
[REDACTED], caused [REDACTED]
[REDACTED] would serve [REDACTED] well,
while allowing [REDACTED] to install an experienced and senior Exelon manager, [REDACTED]
[REDACTED], as the [REDACTED] at Salem. [REDACTED]

(8) [REDACTED]

The second change in the [REDACTED] affected the incumbent [REDACTED]. Similar to the circumstances affecting [REDACTED], [REDACTED] had identified an Exelon manager to assume [REDACTED] responsibilities. [REDACTED] This person was returning to Exelon from a [REDACTED], and [REDACTED] believed his skills to be a good fit for the job. [REDACTED] After disclosing his intention to install this person in [REDACTED] position, [REDACTED] received [REDACTED] Although in this initial meeting, [REDACTED] decided to replace [REDACTED], he opted to retain him in the organization, even though he had not yet identified a particular position. Thus, [REDACTED] were in essentially the same position – displaced, but retained and not assigned.

(9) [REDACTED]

[REDACTED]

[REDACTED]

Because the Exelon management model does not include a [REDACTED] position, [REDACTED] did not have a clear understanding of the responsibilities of the position. [REDACTED] understood that [REDACTED], but [REDACTED] had not determined that the imposition of the [REDACTED]. [REDACTED]

Nevertheless, [REDACTED] raised [REDACTED] continued employment as an issue at the meeting because he felt that [REDACTED] that he believed that [REDACTED] and that he would pursue that topic with [REDACTED] noted that he had also observed [REDACTED]

Preparations for Severance

After [REDACTED] concluded their initial discussions about these potential personnel changes on December 22, 2004, [REDACTED] invited [REDACTED], to join them in their meeting. [REDACTED] informed [REDACTED] that Exelon would be installing a number of its managers in various positions at Salem/Hope Creek, pursuant to the Operating Contract. [REDACTED] also told [REDACTED] that he

[REDACTED]

should prepare appropriate severance packages for five PSEG managers – [REDACTED] [REDACTED] – to be effective January 17, 2005. Additionally, [REDACTED] to expect the Exelon managers to be on-site on January 10, 2005. [REDACTED]

[REDACTED] Meets with [REDACTED] – January 4, 2005

Consistent with [REDACTED] [REDACTED] on December 22, 2004, [REDACTED] met with [REDACTED] to discuss [REDACTED]. [REDACTED] advised [REDACTED] that [REDACTED] was being replaced by [REDACTED]. [REDACTED] also remarked that he was uncertain of the [REDACTED] under the Exelon model and that he was also uncertain about [REDACTED] position, in particular. [REDACTED] [REDACTED], too, expressed concern about the “fit” between the [REDACTED] and the Exelon model. [REDACTED] [REDACTED] then offered [REDACTED] [REDACTED], to be effective January 17, 2005. [REDACTED] In this meeting, [REDACTED] informed [REDACTED] that he did not have to accept [REDACTED] and that he could elect to remain with the Company and “take his chances” in the new organization. [REDACTED] He and [REDACTED] also discussed the possibility of extending the [REDACTED]

[REDACTED] Follow-up Discussions – Week of January 3, 2005

During the first week of January, 2005, [REDACTED] had several meetings to follow-up his discussions with [REDACTED]. In particular, [REDACTED] discussed the pending severance of the five PSEG managers with [REDACTED], who urged [REDACTED] not to terminate their employment. [REDACTED] recommended addressing their performance issues through the performance management process. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] also spoke to [REDACTED], an Exelon employee who was serving as the [REDACTED]. [REDACTED] recalls [REDACTED] indicating that he would like to retain [REDACTED]. Given this feedback from [REDACTED] and [REDACTED], [REDACTED] informed [REDACTED] that he may not need severance packages for all five PSEG managers. [REDACTED] mentioned that he was having discussions on this topic with [REDACTED] and [REDACTED].

Severance Plans Confirmed – January 5, 2005

On January 5, 2005, [REDACTED] requested that he be permitted to remain until March 28, 2005, at which time, he would accept the [REDACTED] offered. [REDACTED]

Given this request and the uncertainty surrounding the circumstances of [REDACTED] on January 5, 2005. According to [REDACTED] indicated that he believed that it would be best to sever those PSEG employees who were being replaced and who had been identified by [REDACTED].

[REDACTED] indicating that it would be better to have [REDACTED] leave at the same time as the others, even though [REDACTED] did not intend to replace [REDACTED]. [REDACTED] does not recall having this specific conversation about the timing of [REDACTED] termination. [REDACTED] understood, however, that [REDACTED] would be [REDACTED].

[REDACTED]

inform [REDACTED] of this change. [REDACTED] did not know what assignment [REDACTED] would receive. [REDACTED] [REDACTED] advised [REDACTED] of this information later that day. [REDACTED]

[REDACTED] also called [REDACTED], who had been slated to serve as the [REDACTED], to inform him that he would not take over that position upon his return from [REDACTED]. He advised [REDACTED] that Exelon had not provided him with an assignment as of that date, but that [REDACTED] should “sit tight” until such time. [REDACTED]

Additionally, on January 6, 2005, PSEG issued a press release announcing that Mr. Levis would replace Mr. Bakken as the CNO for Salem/Hope Creek. The press release also indicated that under the Operating Contract, Exelon managers would begin working at the site on January 17, 2005. The press release did not disclose the number or identity of the incoming Exelon managers, or the identity or positions of the affected PSEG managers.⁸²

Announcement of the Management Changes – January 7, 2005

One of the PSEG managers to be replaced did not learn of his replacement on January 6, 2005. [REDACTED] learned of his replacement on January 7, 2005, shortly before an “all-hands” meeting to announce the changes. [REDACTED] [REDACTED], told [REDACTED] that he was being replaced, but that he would remain with the Company in a position that had not yet been identified. [REDACTED]

On the morning of January 7, 2005, PSEG announced the personnel changes to the workforce.⁸⁴

B. Chronology of Relevant Events Related to the ERB

As noted earlier, on December 22, 2004, [REDACTED] to prepare severance packages for five PSEG managers – [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

⁸² Press Release, “Exelon Corporation Prepares to Provide Operating Services For PSEG Nuclear Plants,” Jan. 6, 2005 (Exhibit 12).

⁸³ [REDACTED]

⁸⁴ Questions and Answers, January 7, 2005 (Exhibit 13).

Given [REDACTED] various conversations about the ERB, he wrote an e-mail to [REDACTED] on the evening of January 5, 2005, memorializing his opposition to proceeding with the personnel actions without an ERB. [REDACTED]

After the announcement of the personnel changes on Friday, January 7, 2005, Mr. Eugene Cobey, a NRC Branch Chief at Region I, met with [REDACTED] to ask about the personnel moves and to find out if the ERB had reviewed the decisions. [REDACTED] [REDACTED] informed him that the ERB had not reviewed the actions. [REDACTED] Later that same day, Mr. Cobey called [REDACTED] and posed the following question to PSEG: "How does the decision to not follow the ERB process comport with commitments made to keep all SCWE commitments in place?" [REDACTED] [REDACTED] then passed this message to [REDACTED]. [REDACTED]

[REDACTED] also spoke to [REDACTED] on January 7, 2005, to inform [REDACTED] of the NRC's concern and [REDACTED] belief that the ERB should have reviewed the recently announced personnel actions. [REDACTED] spoke to Mr. Samuel Collins, Regional Administrator, NRC Region I, either that day or the next to discuss the personnel changes, but the topic of the ERB did not arise. [REDACTED]

Over the weekend, [REDACTED] discussed the possibility of conducting an "after-the-fact" ERB review of the personnel actions. [REDACTED]

The following Monday, January 10, 2005, Mr. Bakken spoke to Mr. Collins and Mr. A. Randolph Blough, Director, Division of Reactor Projects, about the personnel actions and absence of an ERB review. [REDACTED] [REDACTED] confirmed [REDACTED] earlier statement to Mr. Cobey that PSEG had not conducted an ERB. He also explained his reasons for not seeking the review. First, he did not believe that a firm commitment

[REDACTED]

[REDACTED] that he was only principally responsible for [REDACTED] termination, and to a lesser degree, the terminations of [REDACTED]

The issue remained unresolved. On Thursday, January 20, 2005, [REDACTED] met with [REDACTED], [REDACTED], and, by phone, [REDACTED]. The participants discussed whether to conduct an after-the-fact ERB review, and if so, how to ensure that such a review would be meaningful and not an empty gesture with a predetermined outcome. [REDACTED] At this meeting, [REDACTED] opposed the notion of conducting the review, believing that the outcome would be predetermined. [REDACTED] [REDACTED] disagreed, noting that, although not ideal, an ERB review could be objective and would demonstrate compliance (albeit late compliance) with the process. [REDACTED] The participants did not resolve the issue during this meeting, but they concluded that the ERB, which had been scheduled for the next day, Friday, January 21, 2005, could not be conducted because the screens would not be ready and because they had not been able to identify a senior manager to present the bases for the personnel actions. [REDACTED] After the conclusion of that meeting, [REDACTED] reconsidered his position and agreed to conduct an after-the-fact ERB, as long as the outcome was not predetermined. [REDACTED]

The practical problems associated with the conduct of an after-the-fact ERB, including the potential composition of such an ERB, ultimately caused the Company to turn away from that approach and, instead, commission this Independent Review.¹¹¹

VI. Analysis and Conclusions

As noted earlier, the Charter, as supplemented by the NRC letter of February 17, 2005, requires the Review Team to determine:

(A) Whether the protected activity of any adversely affected PSEG manager played a part in the decision to take the adverse action;

[REDACTED]

¹¹¹ All of the PSEG and Exelon senior managers who were involved in these discussions about whether (and how) to conduct an ERB, ultimately agreed with the decision to commission an independent review.

(B) The reasons why the ERB did not review the personnel actions before implementation; and

(C) Whether the personnel actions significantly affected the Safety Conscious Work Environment at Salem/Hope Creek.

A. The Protected Activity of the Adversely Affected PSEG Managers Did Not Play a Part in the Personnel Actions of January 14, 2005

To determine whether protected activity played any role in the personnel decisions, the Review Team assessed each of the four elements of a violation of 10 CFR § 50.7:

- Whether the individuals engaged in protected activity;
- Whether the individuals suffered some form of involuntary adverse employment action;
- Whether the decision makers knew of the protected activity; and
- Whether the protected activity was a contributing factor in the decision to take the adverse action.

1. Protected Activity

Given the low threshold that exists for an activity to be considered “protected activity,” each of the adversely affected PSEG managers could argue that he engaged in activity protected by 10 CFR § 50.7. Indeed, as managers at a nuclear facility, each would routinely identify issues affecting nuclear safety and compliance with NRC requirements and discuss them with management. The normal course of business for managers at any nuclear facility necessarily requires that they look critically at systems, processes, and equipment and take action to continually improve the safe operation of the plant.

To develop a greater understanding of the nature of any protected activity of the adversely affected managers, the Review Team requested that Mr. Lake, the SCWE Organization Leader conduct a review of relevant records. As part of his regularly assigned duties, Mr. Lake performs this same “screening review” for the ERB. In fact, as noted earlier, [REDACTED] began a review in January 2005, when requested by [REDACTED], in anticipation of conducting an “after-the-fact” ERB. [REDACTED] As requested by the Review Team, [REDACTED] completed his review and provided a written

[REDACTED]

response. [] [] concluded that each of the terminated managers engaged in protected activity. [] also performed a screening review for [] [], the ERB rejected. [] recent review substantiated the existence of [] protected activity.

The Review Team accepted Mr. Lake's conclusion without performing a detailed examination of the actions of each of the adversely affected managers to determine if their actions rose to the level necessary for protection under 10 CFR § 50.7. Such an inquiry would have been necessary had the facts providing the basis for the adverse action suggested in any way that a person's raising of a nuclear safety concern (or a concern of any sort) contributed to the decision to take adverse action or had the facts suggested that the proffered business reasons were pretextual. As discussed later, however, the Review Team found no such evidence.

To the extent that an adversely affected manager believes that protected activity may have played a role in his termination or replacement, the report identifies the alleged protected activity in greater detail when analyzing the basis for the adverse action.

2. Adverse Action

All but one of the PSEG managers affected by the personnel actions of January 14, 2005, suffered adverse employment action. As discussed earlier, PSEG terminated the employment of five managers – [] []. PSEG also terminated []. By definition, terminations are adverse action.

Those not terminated also suffered adverse employment action, with one exception. Notably, [] terms and conditions of employment have not changed. Although [] intended to replace [] [] with an Exelon manager, and the organization chart published on January 11, 2005, indicates that an unnamed Exelon manager will be serving in that position, Mr. Hanley's replacement never arrived. As a result, [] served continuously as the [] until his voluntary departure from the Company in [].

The remaining managers, however, suffered adverse employment action because they were either transferred involuntarily to a new facility to a position of arguably less responsibility (as in the case of []), or displaced entirely, without receiving a permanent assignment (as in the case of []).

[]

Two officers also suffered adverse employment action by virtue of their transfer. Specifically, Mr. Bakken left his position as President and CNO of PSEG Nuclear, to serve in the position of Senior Vice President – Power Transition.¹¹⁴ Likewise, [REDACTED] suffered adverse action because he was [REDACTED]. Moreover, given the transfer of the [REDACTED] functions from [REDACTED] current responsibilities in this position are less substantial than those held by his predecessor, [REDACTED].

3. Knowledge

In assessing this element, the key issue is whether the person(s) making the decision to take the adverse action knew of the protected activity. Given the positions held by the adversely affected managers, the three decision makers – [REDACTED] – understood generally that, in the course of their work assignments, each of the managers identified and discussed issues, safety concerns, equipment problems, personnel concerns, and similar matters, and, thereby engaged in protected activity. Of course, the level of knowledge by each of the decision makers varied. As the [REDACTED] was closest to the managers and had the most knowledge of the performance and associated protected activities of the managers. To the extent that specific protected activities are relevant, those activities are discussed in the following analysis addressing the reasons for the personnel actions.

4. Causation

As the chronology of events demonstrates, the driving force behind the personnel actions was the merger agreement and the related Operating Contract, which called for Exelon to assign experienced managers to key positions at Salem/Hope Creek. To implement these arrangements, the three senior executives from Exelon and PSEG met on December 22, 2004, to review potential personnel moves.

The facts clearly establish that in that meeting and in their subsequent discussions, these three executives acted for one purpose – to implement the Operating Contract by installing experienced Exelon leaders in key leadership positions. With that overarching – and legitimate – basis behind their actions, the decision makers sought to create an organization with the greatest opportunity for success. As a result, PSEG managers whose performance [REDACTED] were vulnerable to being replaced. Even good PSEG performers, in key positions, were vulnerable to being replaced by an Exelon manager experienced in the Exelon Management Model. In fact, the Operating Contract specifically required Exelon to “implement the [Exelon] Nuclear Management Model and

¹¹⁴ [REDACTED]

to make changes in PS[EG] Nuclear management staff, organization, procedures and processes to improve safety margins and performance at the PS[EG] Nuclear Facilities.”¹¹⁵

Given these obligations and responsibilities, the decision makers approached their task methodically. First, Mr. Levis assessed the needs of the organization and identified Exelon managers with the experience and skills to address his needs. Having identified potential candidates, he then determined their willingness and availability to serve at Salem/Hope Creek. With a tentative roster of qualified and available Exelon managers and an understanding of the needs of the organization, [REDACTED] [REDACTED] to solicit their views and to try to match his incoming personnel with the needs of the station. In some instances, the needs called for the replacement of [REDACTED]. In these cases, the views of [REDACTED] [REDACTED] usually controlled the outcome. In other instances, the needs called for the installation of an Exelon manager in a critical position to enable Exelon to have a near-term positive impact on performance. In these circumstances, the availability of an experienced Exelon manager most often dictated the decision. In other instances, the needs simply required the filling of a vacancy. Again, the availability of Exelon resources controlled the outcome. Regardless of the precise path chosen, the executives sought to place the best available managers in the positions of the greatest significance in order to arrest any further degradation in station performance and to optimize the chances for improvement.

This overall purpose and general structure of the discussions was appropriate and lawful. Moreover, there is no evidence to suggest that the topic of any manager’s protected activity arose during the discussions among the three executives. But the absence of such explicit discussions does not necessarily mean that a person’s protected activity did not play a part in the decision making or in a recommendation that formed the basis for a decision. For this reason, the specific decisions require scrutiny to determine if the stated bases for the decisions were merely a pretext for retaliation. The discussion that follows establishes that bases for the personnel actions were not a pretext for retaliation.

(A) Managers with [REDACTED]

[REDACTED]

[REDACTED] believed that it was important for him to not send forward to Exelon key managers whom he regarded as having [REDACTED]

[REDACTED]

[REDACTED] He placed three managers in this category – [REDACTED]
[REDACTED]. Accordingly, [REDACTED] of their
concerns about the performance of each of these managers in their discussions. Before
hearing their views, however, [REDACTED] had already decided to replace [REDACTED]
and, probably, [REDACTED], based upon his personal observations and awareness of the
performance of [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] views [REDACTED]
[REDACTED] Notably, concerns about the [REDACTED]
[REDACTED] pre-date the merger and related personnel discussions with [REDACTED]

There is no evidence that indicates that any protected activity played any part in the severance of [REDACTED]. Indeed, neither have asserted that protected activity contributed to their terminations. [REDACTED] In fact, as a [REDACTED] [REDACTED] expected that he would be terminated upon implementation of the Operating Contact. [REDACTED]

Finally, some interviewees reported hearing an assertion that those managers with prior service as Exelon employees, like [REDACTED], were targeted for replacement or

[REDACTED]

termination. [REDACTED] As discussed later in this report, there is simply no evidence linking a person's prior service with Exelon to these personnel decisions. More significantly, no one has suggested that a person's protected activity at Exelon played a role in these decisions.

[REDACTED]

[REDACTED]

Additionally, [REDACTED] was uncertain of the role that the [REDACTED] [REDACTED] would play in the Exelon model. Accordingly, he told [REDACTED] that he was skeptical about the organization's long-term future, and also [REDACTED] [REDACTED] shared these concerns about the [REDACTED] future with [REDACTED] [REDACTED] during the first week of January 2005, who concurred, and suggested to [REDACTED] [REDACTED] that he ask [REDACTED] for a severance package. [REDACTED] [REDACTED] recalled [REDACTED] [REDACTED] concluding that he did not [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The question at hand is not whether [REDACTED]. The question is whether protected activity motivated [REDACTED] to criticize his performance and, ultimately, to select (or recommend) [REDACTED] for severance. The preponderance of the evidence supports a conclusion that protected activity did not play a role in [REDACTED] selection.

First, even before [REDACTED], and before [REDACTED] became the [REDACTED], raised questions about [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In so doing, [REDACTED] observations refute any suggestion that [REDACTED] views arose from some protected activity.

[REDACTED]

Additionally, in December 2004, before the announcement of the merger with Exelon and the initiation of discussions with [REDACTED] had informed [REDACTED], that he would soon be recommending [REDACTED] separation from PSEG because, [REDACTED], he did not believe that [REDACTED] (At the same time, [REDACTED] advised [REDACTED] that he would also be recommending the termination of [REDACTED]) Accordingly, he informed [REDACTED] that he would be seeking [REDACTED] assistance in the future to address this issue. [REDACTED]

[REDACTED] longstanding and consistent opinion about [REDACTED] does not establish, by itself, that his views were lawful. But the consistency of his views and the timing of his expression of those views disassociates his views from the primary incident that [REDACTED] believes may have led to his separation.

Specifically, on several occasions during November and December 2004, [REDACTED] intervened in the management of a contractor who had engaged in protected activity. [REDACTED] intervention placed him in a somewhat adversarial, although "cordial," [REDACTED] position with an Exelon manager, [REDACTED]

[REDACTED]

[REDACTED] also provided candid counseling to the Exelon manager about several aspects of the manager's behavior – behavior that [REDACTED] believed to be inappropriate. Among other things, [REDACTED] was concerned about the manager maintaining a supervisory file only on the contractor and not others. On December 17, 2004, the issue came to a head, and [REDACTED] asked the manager for the file, which [REDACTED] retained until his termination. [REDACTED]

[REDACTED] believes that his encounters with this Exelon manager may have contributed to his selection for termination. [REDACTED] Several facts refute this belief. First, when [REDACTED] briefed [REDACTED] about his coaching of this manager in November 2004, [REDACTED] indicated that [REDACTED] received the information favorably and thanked [REDACTED] for doing his job. [REDACTED] In other words, [REDACTED] showed no sign that he considered [REDACTED] intervention to be troublesome or problematic. So too, when [REDACTED] briefed [REDACTED] on his work with this manager, [REDACTED] supported [REDACTED] There is no indication that [REDACTED] work with this manager contributed in any way to [REDACTED] Moreover, [REDACTED] had expressed his disappointment about [REDACTED] long before the issue came to a head with this manager on December 17, 2004. As noted earlier, [REDACTED] had previously asked [REDACTED] to assist him in severing [REDACTED]

Finally, the manager with whom [REDACTED] "locked horns" [REDACTED] did not provide any input to the decision makers, [REDACTED] In particular, he did not speak about [REDACTED], with any of

[REDACTED]

the three executive decision makers or his fellow Exelon managers. [REDACTED] In fact, [REDACTED] did not involve any of his subordinate managers in his decision making. Interviews with the key Exelon managers on-site during this time, confirmed that they provided no input to [REDACTED] into the personnel decision announced on January 7, 2005. [REDACTED]

In conclusion, the preponderance of the evidence indicates that [REDACTED] protected activity did not contribute to [REDACTED] decision to offer severance to [REDACTED].

(B) Replacing Managers in Key Positions

As discussed earlier, by the end of December 2004, Mr. Levis had assembled a list of experienced Exelon managers who were available to fill key positions at Salem/Hope Creek. To address these positions, Mr. Levis identified his proposed replacements to [REDACTED], who then discussed their views of the performance of the PSEG incumbent. Based upon this information, Mr. Levis then decided if he believed that the organization could use the displaced PSEG manager in the future. Using this informal, collaborative process, Mr. Levis filled the positions held by [REDACTED].

[REDACTED]

Before meeting with [REDACTED] had decided to install an Exelon manager in the [REDACTED] [REDACTED] knew that the five-year budget for that organization was [REDACTED]. According to [REDACTED], his budget [REDACTED]. [REDACTED] Apart from the management of that budget, [REDACTED] knew that the budget reflected a number of very important projects. Among those were projects [REDACTED].

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Given these circumstances, Mr. Levis considered it essential for him to have a person experienced in the Exelon business model take control of this organization. He believed that the imposition of new processes and new management would not only lead to cost savings, he believed that it would result in the delivery of better project management. As a result, he installed [REDACTED]

[REDACTED], noting that [REDACTED]. Indeed, [REDACTED] considered [REDACTED] to be an area [REDACTED]. With this input, [REDACTED] indicated that he did not have a place for [REDACTED]. As a result, he was selected for severance.

There is no evidence to suggest that any of the participants in this decision considered any protected activity engaged in by [REDACTED]. Indeed, the topic of protected activity simply never arose in their discussions, and [REDACTED] had no knowledge of any particular protected activity engaged in by [REDACTED]. Nor did [REDACTED] identify any such activity in his interview that he believes led to his severance. In fact, he stated explicitly that he does not believe that his severance was retaliatory. Rather, he considered it a business decision, because he managed [REDACTED]. Clearly, Exelon had a legitimate business interest in having an experienced Exelon manager oversee the budget of such an important area.

[REDACTED]

The circumstances surrounding the severance of [REDACTED] mirror those of [REDACTED]. In fact, [REDACTED] worked closely with [REDACTED], by providing the [REDACTED]. Thus, the need for control of the management of [REDACTED] meant that Exelon also needed to install new management in the [REDACTED] organization. For this reason, [REDACTED] also knew that he would replace [REDACTED] with an experienced Exelon manager. In this case, he chose [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] Although [REDACTED] did not discuss his selection of [REDACTED] with [REDACTED] had worked with [REDACTED]

Again, [REDACTED] assessment of the site's needs was consistent with the feedback provided by [REDACTED]. In this instance, PSEG had previously designated [REDACTED] as a focus area in its Nuclear Business Plan.¹⁶⁷ Installing proven leadership in this area would allow Exelon to improve [REDACTED] and capitalize on a new management model that [REDACTED] understood to be a particular Exelon strength. [REDACTED] Because neither [REDACTED] urged [REDACTED] to find a position for [REDACTED], he was not retained. [REDACTED]

As in the case of [REDACTED], the decision makers did not discuss any protected activity engaged in by [REDACTED]. The topic never arose. Indeed, [REDACTED] did not even know [REDACTED] Moreover, [REDACTED] does not believe that any protected activity affected the decision to offer him severance. [REDACTED] Accordingly, there is no reason to believe that any protected activity engaged in by [REDACTED] played a part in his severance.

[REDACTED]

[REDACTED]

¹⁶⁷ See Letter from A. Christopher Bakken to Hubert J. Miller, June 25, 2004 (Exhibit 24).

[REDACTED]

Consistent with the process and logic of the decisions affecting [REDACTED] and [REDACTED], business reasons led [REDACTED] to replace [REDACTED] with [REDACTED]. [REDACTED] believed that site performance could be improved with [REDACTED] – another one of the five focus areas in the current PSEG Nuclear Business Plan. He knew [REDACTED]

[REDACTED] Based upon this information, [REDACTED] requested that PSEG retain [REDACTED], even though [REDACTED] had not identified a particular position for him at the time of the personnel changes.

These legitimate business reasons – not any protected activity – prompted [REDACTED] replacement. And, as in the cases of [REDACTED] has no reason to believe that any protected activity led in any way to his replacement. [REDACTED] Although [REDACTED] wrote several Notifications, he does not believe that any were a source of frustration or concern to management. [REDACTED]

[REDACTED] circumstances differ from the circumstances of [REDACTED] in only one respect – the outcome. Otherwise, the process and the logic used in the decision making was the same.

In evaluating the [REDACTED], [REDACTED] identified two experienced Exelon managers to assume the positions of [REDACTED] former position) and [REDACTED] position). He identified the need to replace management in this organization because of the longstanding difficulties associated with maintaining the Salem plant. [REDACTED]

[REDACTED] [REDACTED] was aware of these conditions through his participation in the Salem joint owners meetings and briefings, as well as his attendance at the INPO exit briefing. [REDACTED]

[REDACTED]

[REDACTED]

In his search for an Exelon manager to assume [REDACTED] position, [REDACTED] identified a qualified manager [REDACTED] [REDACTED] was willing to do so, but at the time of the January 7, 2005 announcement, he had not identified a particular position for [REDACTED].

[REDACTED] designated replacement had [REDACTED] As a result, [REDACTED] remained as the [REDACTED]

[REDACTED]

[REDACTED], even though he had been informed that he would be replaced. In the days immediately before and after the announcement, Exelon was not successful in identifying a qualified replacement for [REDACTED]. Accordingly, he remained in his original position. [REDACTED]

There is no evidence that Mr. Levis sought to replace [REDACTED] for any protected activity. Rather, [REDACTED] believed that Salem's performance could be improved by the introduction of new management in the [REDACTED] and, for that reason alone, they chose to replace [REDACTED]. [REDACTED] support [REDACTED] to [REDACTED] contradicts any notion that he bore ill will for any protected activity engaged in by [REDACTED]. Similarly, [REDACTED] decision to retain [REDACTED] in his original position provides convincing evidence that [REDACTED] lacked a retaliatory motive. Indeed, [REDACTED] was not aware of any specific protected activity engaged in by [REDACTED] and, as in the discussions about the other managers, the topic never arose. Finally, [REDACTED] knows of no information which suggests that his aborted replacement arose because of any protected activity. [REDACTED]

[REDACTED]

As discussed above, Mr. Levis recognized the need to address longstanding [REDACTED]. Part of his solution included the selection of a senior Exelon manager, [REDACTED], to head the [REDACTED]. Apart from [REDACTED] knowledge and familiarity with the Exelon Management Model, [REDACTED] had previously served as the [REDACTED]

When the three executive decision makers met on December 22, 2004, to discuss the upcoming personnel moves, [REDACTED] already knew that he wanted to place [REDACTED] in the [REDACTED]. He was also aware that in the

[REDACTED]

[redacted] [redacted] disclosed his intentions, however, to [redacted]

[redacted] arrival in [redacted] would not only allow [redacted], it would also allow [redacted] to [redacted]. As discussed earlier, [redacted]. And, although [redacted].

[redacted]

[redacted]

[redacted]

It was for these positive (and legitimate business) reasons that [redacted] was transferred to the [redacted].

[redacted], however, does not accept this. Instead, he believes that management [redacted] in retaliation for having engaged in protected activity. To support his contention, [redacted] asserts that he often took

[redacted]
[redacted]

[REDACTED], has provided any reason to believe that [REDACTED] harbored any ill will because of [REDACTED] various positions on the [REDACTED]. To the contrary, [REDACTED].

Similarly, [REDACTED], the other decision maker responsible for [REDACTED], had no reason to retaliate. [REDACTED] various positions had no substantial effect on [REDACTED], one way or the other. Rather, [REDACTED] wanted to new leadership in the [REDACTED] to address [REDACTED]. Moreover, [REDACTED] viewed the [REDACTED]. Indeed, [REDACTED] favored the move because it put [REDACTED] may not have wanted the job, but his displeasure at the transfer does not make it retaliatory.

B. The Decision to By-Pass the Executive Review Board

PSEG advised representatives of the NRC on January 7, 2005, the day of the public announcement of the personnel changes, that the ERB had not reviewed the changes. [REDACTED] As the Findings set forth above demonstrate, senior PSEG management was aware of the ERB Charter and its role in reviewing personnel actions such as terminations, transfers, and replacements. Of course, management was also aware of its commitment to provide quarterly reports to the NRC addressing PSEG's efforts to improve and maintain a safety conscious work environment.¹⁹⁹ Nevertheless, management implemented the changes without ERB review.

The decision to take this course does not reflect an intent by PSEG or Exelon management to deliberately disregard regulatory requirements or commitments. Nor does it evidence a cavalier attitude towards internal policies and practices. Management in both companies acted in good faith in seeking to determine whether to obtain ERB review and, if so, how to proceed. But, despite these good intentions, the decision had unforeseen adverse consequences.

1. The Reasoning

Four reasons caused management to proceed without ERB review. First, although the ERB Charter is not perfectly clear, the ERB does not render a final, authoritative decision on a proposed personnel action. Rather, as the ERB Charter directs, the ERB Chairperson, after a review and discussion with the ERB, either "objects" or "does not

¹⁹⁹ See Letter of June 25, 2004.

object” to a proposed personnel action. [REDACTED] If the ERB objects to a proposed action, the ERB Charter does not provide the ERB with the authority to preclude the action. Indeed, there is no evidence, documentary or otherwise, indicating that senior management delegated its ultimate decision making authority to the ERB.

[REDACTED], indicated that he does not interpret the ERB Charter as providing the ERB with final decision making authority. [REDACTED] Consistent with this interpretation, [REDACTED] understood that, [REDACTED], he had the authority to take an action over an ERB “objection.” [REDACTED] [REDACTED] also shared that interpretation. [REDACTED]

Given the ERB’s role, [REDACTED] saw little purpose in an ERB review of these personnel actions. Because [REDACTED], had the authority to disregard an ERB objection, [REDACTED], it would have been an academic exercise, particularly in light of the unusual circumstances surrounding these personnel actions. [REDACTED]

These circumstances give rise to the second reason why the decision makers chose not to obtain ERB review. Specifically, [REDACTED] believed that the Operating Contract provided Exelon with sufficient authority to designate the new management team. [REDACTED] [REDACTED] reasoned that a denial by the ERB of the replacement of a PSEG manager would interfere with Exelon’s obligations under the Operating Contract to manage the plant and to install its managers in key positions. [REDACTED] In this regard, the Operating Contract provides that “[t]he [Exelon provided] CNO, together with additional personnel provided by Exelon, *shall have the responsibility and the authority to implement the [Exelon] Nuclear Management Model and to make changes in PS[EG] Nuclear management, staff, organization, procedures and processes to improve safety margins and performance at [Salem/Hope Creek].*”²⁰⁷ They believed that an ERB objection to a proposed action, if allowed to stand, would run counter to the Operating Contract.

[REDACTED]

²⁰⁷ Operating Contract, Section 3.1.1 (emphasis added).

Third, [REDACTED] believed that significant practical problems precluded the conduct of a meaningful ERB. [REDACTED] For example, the two ERB Chairpersons, Mr. Brothers and Mr. Carlin, were both adversely affected by the personnel actions. As noted earlier, PSEG terminated [REDACTED] employment and [REDACTED] received an assignment with less significant responsibilities. [REDACTED] and, like [REDACTED], also lost his job in these personnel actions. [REDACTED] termination then placed his subordinate, [REDACTED] in an awkward position because [REDACTED]. In that capacity, [REDACTED] investigates whether the person being considered for the personnel action engaged in any protected activity. He also renders an opinion on whether that proposed action would be retaliatory and whether, if implemented, the action would result in a chilling effect. [REDACTED] Answering these questions about [REDACTED], would put [REDACTED], and one in which it would be difficult to remain objective. Finally, the [REDACTED], had some, albeit ministerial, [REDACTED]. Specifically, [REDACTED] received information from [REDACTED] about the identities of the PSEG managers likely to receive severance. [REDACTED] also prepared the severance documents and conducted the termination meetings with all but one of the terminated managers. [REDACTED]

Finally, none of the decision makers believed that a regulatory commitment required the ERB review of these decisions. Mr. Levis indicated that, well before his December 22, 2004 discussions with [REDACTED], he asked [REDACTED] if a commitment existed. [REDACTED] informed [REDACTED] that the use of the ERB was not a regulatory commitment. [REDACTED] recalls advising [REDACTED] on or about January 5, 2005, however, that PSEG discussed the use of the ERB in its letter of June 25, 2004, in which PSEG provided the NRC with its plan for improving the work environment at Salem/Hope Creek. That letter included various commitments, including the publication of certain “metrics” on a quarterly basis. One of the metrics is the number of “[ERB] Action Approvals Without Comment.”²¹² The purpose of this metric was to monitor the performance of management in proposing legitimate adverse

[REDACTED]

²¹² Letter of June 25, 2004, at 8.

actions that were consistent with applicable polices and practices, such that the ERB approved the proposed action without comment or objection.

Like [REDACTED] did not understand the use of the ERB to be a regulatory commitment. [REDACTED] He believed that PSEG had a commitment to report the metrics, but not to conduct an ERB for every potential personnel action. He recognized that a decision to not seek ERB review might cause some increased risk in future litigation, but he considered that risk manageable and, more importantly, he did not envision any regulatory impact from that decision. [REDACTED] Additionally, [REDACTED] consulted with [REDACTED], before deciding to proceed with the personnel actions. [REDACTED]

Likewise, Mr. Bakken did not consider the use of the ERB to be a regulatory commitment. He noted that his letter to the NRC of June 25, 2004, which made certain commitments, specifically allowed PSEG to “modify these metrics in order to meet a future need for monitoring performance.”²¹⁶ That letter also said that PSEG would notify the NRC of the change and the basis for the change if the need to modify the metrics arose. Mr. Bakken indicated that this flexibility reflected his understanding of the discussions that he had with Mr. Collins and Mr. Miller of the NRC, in which they recognized the need for PSEG to retain flexibility and to avoid the adoption of an inflexible, prescriptive SCWE Plan. [REDACTED] Mr. Bakken believed that the contractual obligations imposed by the Operating Contract and the unusual practical problems associated with an ERB review, more than justified his exercising flexibility under these circumstances.

An additional issue about the scope of the ERB review requires comment. As noted earlier, three PSEG officers ([REDACTED]) were also adversely affected by the personnel decisions. The ERB Charter does not address the question of whether the ERB can or should review decisions affecting officers. All of the officers adversely affected, however, believe that the ERB did not have the authority to review officer personnel decisions. [REDACTED] Even [REDACTED], who advocated strongly for the ERB’s review of the personnel actions affecting the managers and [REDACTED], did not believe that an ERB review of officer actions would be

[REDACTED]
[REDACTED]
[REDACTED]

²¹⁶ Letter of June 25, 2004, at 8.

[REDACTED]
[REDACTED]

appropriate. [REDACTED] And, as [REDACTED] noted, the officers serve at the pleasure of the Board of Directors, making any ERB action unnecessary and misplaced. [REDACTED] Consistent with these views, there is no indication that the ERB has ever reviewed a decision affecting an officer. [REDACTED]

An ERB objection to one or more of the decisions affecting PSEG managers was certainly possible and in fact, likely. For example, [REDACTED] believes that the ERB would have had difficulty with: (a) the replacement of those managers whose new assignments were unknown (because they were “in limbo”); (b) the re-assignment of [REDACTED], whose re-assignment was subject to an ERB “objection” [REDACTED]; and (c) the severance of [REDACTED], given his position as [REDACTED]. Because the ERB neither convened with unaffected members, nor heard senior management’s explanation of the moves, [REDACTED] predictions may or may not be correct. Nevertheless, the executives were certainly aware of the possibility of one or more ERB “objections,” given, at a minimum, [REDACTED].

The evidence does not establish, however, that the fear of an ERB objection drove the decision to act without an ERB. First, the decision makers decided not to seek an ERB review while they were still in the process of making the personnel decisions, well before the decisions were final, well before the decisions became known by others, and well before the executives received feedback on this issue from [REDACTED]. In fact, [REDACTED] recalled that [REDACTED] told [REDACTED] on the day that the executives first met to discuss potential changes, December 22, 2004, that the personnel actions would not be reviewed by the ERB. [REDACTED] Second, none of the decision makers cited the possibility of an objection as a reason for proceeding without an ERB review. Rather, the executives understood and accepted the likelihood of one or more objections, but saw no purpose in forcing the issue, given their ultimate authority to act independent of the ERB. In other words, the existence of an objection had no practical effect on their ultimate decision. If the facts were different and the ERB had actual authority to preclude a personnel action, the fear of an ERB objection could have affected the decision making. But the executives knew (or at least unanimously believed) that they – not the ERB – possessed actual decision making authority.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Finally, the executives saw these personnel moves as unique actions, driven by the pending merger and authorized by the terms of the Operating Contract. Their knowledge of the probability (or even certainty) of an ERB objection was simply not a determining factor in their decision making.

Nevertheless, as discussed in the next section, the Review Team believes that an ERB review – even if overruled by the executives – would have been a better course of action. At a minimum, an ERB review would have forced management to view the contemplated actions from the perspective of the affected managers and the workforce. In so doing, the Company could have taken the steps necessary to communicate in a more timely and effective way with the managers and the workers, as well as with the regulator and public.

2. Assessment of the Reasoning

The Review Team has no reason to doubt that the recollection of each of the decision makers accurately reflects their rationale for not obtaining ERB review. Each person independently articulated the same basic rationale for the decision. Moreover, the reasons are neither contrived nor trivial. Indeed, there is a certain logic to the view that the circumstances created by the intended merger and the executed Operating Contract presented the decision makers with a situation that was far from the traditional province of the ERB. And, to be sure, all of the standing members of the ERB were conflicted, either directly or indirectly. Accordingly, the Review Team finds no nefarious motive or hidden agenda at play in the decision.

Having reached that conclusion, however, the Review Team believes that the decision was somewhat short-sighted. Had the decision makers pursued the issue from the perspective of finding ways to make the ERB process work, instead of being stymied by the unusual circumstances, we believe that PSEG could have conducted a meaningful ERB review. Moreover, had an ERB considered the proposed personnel actions and the possible creation of a chilling effect, the ERB would have been in a position to advise and assist management in the roll-out of the decisions to the affected managers and the workforce. With this insight and related planning, the personnel actions could have proceeded with far better communications, better execution, and a less wrenching effect on the persons affected by the decisions. (Of course, an ERB review was not a prerequisite to better communications. Even without an ERB review, management could have – and should have – explained its actions to the affected managers and the workforce. The ERB process simply provided a golden opportunity for management to identify the lack of communications as an issue requiring resolution before taking the personnel actions.)

As noted, we believe that a meaningful ERB could have been conducted. Even though the CNO(s), Mr. Bakken and Mr. Levis knew that they had not considered protected activity in the decision making, and even though they had the authority to override an ERB “objection,” the ERB does more than simply ensure compliance with 10 CFR §50.7. As indicated in its Charter, the ERB also examines whether the proposed

action would “create a chilling effect in the affected workgroup or other workgroups on site.”²²⁴ Had the ERB reviewed the actions, it could have assisted management in assessing this situation and, in particular, advising management about the communication of the decisions to the affected managers and their workgroups. Although, as discussed in the next section, we do not believe the personnel actions have reduced the likelihood that workers will raise nuclear safety concerns, the manner in which these personnel actions occurred have caused some workers (and managers) to take a “wait and see” approach with new management, while tempering their enthusiasm to call attention to themselves by speaking up.

Moreover, the communication of the personnel actions to the adversely affected managers was ineffective and problematic. Indeed, none of the managers who were either terminated or replaced received a timely explanation of basis for the action or the process used to make the decision.²²⁵ The absence of clear communications caused at least two managers, [REDACTED], to believe that their protected activity contributed in some way to the decision. Even those who have not reached that conclusion, however, are at a loss to explain their circumstances. A well-run ERB could have explored these topics and provided advice to PSEG senior management to help resolve these issues.

Nor do we believe that the provisions of the Operating Contract compelled PSEG to abandon the ERB review. As noted earlier, the Operating Agreement clearly provides certain rights and responsibilities to Exelon in terms of changing site management. But the Operating Contract does not provide Exelon with unlimited authority to impose management changes. Indeed, Section 3.1.1 of that agreement provides that “[t]he specific positions to be filled, the duration of the assignments and general scope of the responsibilities will be established from time to time *by mutual agreement* of PS[EG] and Exelon.”²²⁶ Thus, the Operating Contract envisions a role for PSEG in the personnel actions. Moreover, the agreement recognized that as the licensee, PSEG retained “exclusive authority to operate and maintain the [plants] with *final decision making authority*, and with ultimate responsibility for all regulatory requirements.”²²⁷

Additionally, the effective date of the Operating Contract, January 17, 2005,²²⁸ did not necessarily preclude the ERB’s review from a practical perspective. The same provision that establishes that date also provides that the parties can extend the date by mutual agreement, but not later than January 31, 2005. Had the companies agreed, this additional two-week period would have provided sufficient time for the ERB to conduct a meaningful review. Even if the parties could not agree to a formal extension to accommodate an ERB review, the announcements could have been made, “pending an ERB review.” Allowing the Operating Contract’s implementation date to drive or

²²⁴ ERB Charter, Purpose, para. 2.

²²⁵ As discussed in the Findings, however, the three adversely affected officers received an explanation on December 18, 2004.

²²⁶ Operating Contract, Section 3.1.1 (emphasis added).

²²⁷ Operating Contract, Section 4.1.1 (emphasis added).

²²⁸ Operating Contract, Article 2.

influence the decision on whether to seek ERB review, did not allow for an objective consideration of the potential value arising from an ERB review, or the associated risks of not seeking ERB review.

Finally, the practical problems associated with an ERB review were considerable, but they were not insurmountable. The ERB Charter specifically provides for the designation of alternate members, including the designation of an alternate Chairperson.²²⁹ Given this authority, alternate ERB members and an ERB Screener could have been made available, either from Salem/Hope Creek or PSEG corporate headquarters.

These observations do not imply that the rationale employed by the executives was contrived or specious. Their concerns were genuine. Had they sought to find ways to make the ERB process work, however, instead of allowing the unusual conditions to dictate the result, they would have most likely developed a greater appreciation of the importance of the potential impact of the decisions on the affected managers and the workforce. Moreover, by their adherence to the ERB process, they would have substantially reduced the perception of some, and the affected managers in particular, that the process was unfair.

One final observation requires comment. The companies should have recognized that – even if they did not regard an ERB review as a regulatory commitment – the NRC clearly did. Accordingly, prior notice to the NRC of the proposed actions and the rationale for proceeding without an ERB review would have been appropriate.

C. The Personnel Actions Did Not Create a Chilling Effect

Interviews of various managers and members of the workforce and a review of relevant supporting data, indicates that the personnel actions in January 2005 did not cause the workforce to be reluctant to raise nuclear safety concerns. Nevertheless, the pending merger and the related the personnel actions have caused some members of the workforce, including some managers, to assume positions of low visibility, believing that unnecessary attention would be imprudent in this time of change and uncertainty. The Review Team did not find evidence suggesting that the absence of an ERB review of the personnel decisions has adversely affected the willingness of the workforce to voice concerns.

To determine if the personnel actions had a significant adverse effect on the workforce, the Review Team obtained data from the Corrective Action Program Manager, which compared the number of Notifications written from November 2003 to February 2004, against the period November 2004 to February 2005. The data shows that the number of Notifications for the two periods is not appreciably different. If anything, the workers wrote more Notifications during the more recent period. Moreover, a comparison of the number of Notifications written in the weeks and months preceding the January 7, 2005, announcement of the personnel actions, to the six-week

²²⁹ ERB Charter, Purpose, para. 3.

period following those announcements, also shows that the number of Notifications has remained fairly constant. In fact, the number of Notifications actually increased during the two weeks following the announcement of the personnel actions.²³⁰

There is, however, some contrary statistical evidence suggesting that something has occurred recently, which has affected the work environment. Specifically, NRC allegation statistics show that the NRC received seven allegations in January 2005 concerning Salem/Hope Creek.²³¹ Not knowing the source or precise content of those allegations precludes a conclusion about the reasons why someone, who may or may not be an employee, would raise concerns about Salem/Hope Creek with the NRC. In other words, the numbers, by themselves, do not necessarily establish a relationship between the personnel actions of January 2005 and the concerns. On the other hand, the timing of the increase in NRC allegations at least suggests some possible linkage. The increased number of NRC allegations certainly bears watching as one of a number of potential indicators of changes in the work environment at Salem/Hope Creek.

The Review Team also interviewed the Employee Concerns Program (“ECP”) Manager to determine if either the ECP case load or his discussions with the workforce disclosed any reluctance to raise issues in the wake of the personnel announcements. The ECP Manager indicated that his incoming case load has not decreased, and he has not heard a groundswell of concern from the workforce expressing a reluctance to raise nuclear safety concerns. [REDACTED] He believes, however, that the workforce is proceeding cautiously at this point, given their lack of understanding of the reasons for the personnel actions [REDACTED]

The ECP Manager’s information tracks the anecdotal information collected during Review Team interviews. During each of these interviews, the Review Team asked the interviewee if he or she had seen any indication that the workforce was more reluctant to raise nuclear safety concerns because of the personnel actions. In all but one instance, the interviewees responded that they were confident that the actions had not diminished the workers’ willingness to raise nuclear safety concerns. [REDACTED] In fact, many interviewees dismissed the notion that the workforce would hesitate to raise such an

²³⁰ Corrective Action Program Notification Charts, prepared by Patricia E. Steinhauer, Feb. 18, 2005 (Exhibit 27).

²³¹ NRC Allegations By Calendar Year Received January 2001 – January 2005 (Exhibit 28).

[REDACTED]

Similarly, the absence of information has led some to speculate about the bases for the actions. As an example, some believed (erroneously) that a person's prior service with Exelon was a factor in the decisions. [REDACTED]

More importantly, some questioned whether the moves signaled a diminished emphasis on the work environment. [REDACTED] The termination of the SCWE Manager was particularly perplexing. At a time when the work environment at Salem/Hope Creek is a focus of the PSEG Nuclear Business Plan, as well as an area of heightened regulatory scrutiny, some interviewees did not know how to interpret [REDACTED] [REDACTED] Except for those with whom [REDACTED] had shared [REDACTED], the interviewees were at a loss to explain [REDACTED]. That loss, combined with the termination of [REDACTED], and the reassignment of [REDACTED], led several interviewees to question the Company's commitment to its efforts to strengthen the work environment.

The net effect of the pending merger and the unexplained personnel actions has been to cause the workforce to "hunker down." [REDACTED] Not knowing what happened to cause so many visible managers to be either terminated or replaced has been difficult for some people. [REDACTED] Virtually all of those interviewed were surprised by the announcement, as it related to at least some of the affected managers. As a result, workers and managers may think twice before expressing disagreement with a decision or voicing a differing opinion. [REDACTED] But there is no evidence to indicate that the personnel actions have caused workers to hesitate to raise a nuclear safety concern.

[REDACTED]

[REDACTED]