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Date: 11/4/05 3:43PM

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Dear Mr. Lesar:

Attached, please find NEI comments on the NRC's proposed evaluation criteria for continued use of Alternative Dispute Resolution in the agency's enforcement program.

If you have any questions concerning this submittal, please contact me.

Ellen C. Ginsberg  
Vice President and General Counsel

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NUCLEAR ENERGY INSTITUTE

Ellen C. Ginsberg  
Vice President and  
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November 4, 2005

Michael T. Lesar  
Chief, Rules and Directives Branch  
Division of Administrative Services  
Office of Administration  
Mail Stop T6-D59  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001

Re: NEI Comments on NRC's Proposed Evaluation Criteria for Continued Use of Alternative Dispute Resolution in NRC's Enforcement Program and Recommendations for Improvement

Dear Mr. Lesar:

I. Introduction

In August 2004, the U.S. Nuclear Regulatory Commission (NRC) initiated a pilot program to permit licensees and employees engage in Alternative Dispute Resolution (ADR) to resolve discrimination cases and other wrongdoing cases in a more timely and effective way. The NRC is now evaluating the pilot program after approximately one year of operation. As an initial step in the evaluation process, on October 5, 2005, the NRC noticed a Request for Comments and Announcement of a Public Meeting. See 70 Fed. Reg. 58245 (Oct. 5, 2005). The Staff held a public workshop on October 11, 2005 to discuss the NRC's proposed evaluation criteria for continued use and to receive other comments regarding the pilot program.

On behalf of the commercial nuclear energy industry, the Nuclear Energy Institute (NEI)<sup>1</sup> submits comments on the NRC's pilot program and the proposed evaluation criteria to determine whether to continue the use of ADR in the NRC's Enforcement Program. In sum, the industry

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<sup>1</sup> NEI is the organization responsible for establishing unified industry policy on matters affecting the nuclear energy industry. NEI's members include all entities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, nuclear material licensees, and other organizations and individuals involved in the nuclear energy industry.

believes that the pilot program has demonstrated that ADR can provide an effective and efficient approach for resolving allegations and proposed enforcement actions. In some instances, it has proven to be considerably more efficient and effective than the traditional investigation and enforcement processes.

The pilot program has been a cost-effective option for resolving disputes when compared to traditional investigation and enforcement. Mediator fees, as well as other costs, have been reasonable.

The program has been more timely than traditional investigations and enforcement. The time for disposition through ADR appears to be measured in months rather than years, as has been the case in some traditional investigation and enforcement actions.

Industry participants have been generally satisfied and definitely would consider use of ADR in the future. The industry believes there is value in ADR as it not only holds the prospect of addressing the issues more directly and informally, but is designed to promote reconciliation, a particularly worthy goal in allegation-related disputes.

Further, the NRC should continue this program because it is consistent with a much broader government initiative to encourage resolution of disputes through alternative means. It is well recognized that formal government investigations, enforcement processes and litigation are often time consuming, costly and ineffective. Having an additional mechanism through which parties resolve disputes on a voluntary basis provides a significant value and is in keeping with the trend for federal and state agencies, as well as federal and state court systems.

Thus, for all of the reasons stated, the industry recommends that the NRC's ADR pilot program be retained as a permanent part of the Enforcement Program and expanded. It should cover a greater variety of allegations and proposed enforcement actions, and be available throughout the investigation and enforcement processes – not simply at four discrete points in time.

## II. NRC's Proposed Evaluation Criteria for Continued Use

In evaluating whether to recommend continued use of ADR in enforcement, the Staff has proposed evaluation criteria for program effectiveness, efficiency, and satisfaction. As to effectiveness, the Staff proposes criteria including whether ADR meets the goals of enforcement, maintains safety, and produces settlement rates consistent with other ADR programs. As to efficiency, the Staff proposes criteria evaluating timeliness and cost. In an effort to judge user satisfaction, the Staff proposes a review of the parties who have availed themselves of ADR relative to fairness, usefulness, sufficiency of outcomes, and their willingness to use the process again. The Staff also hopes to ascertain public perception of the program.

Although many of the factors cited by the Staff are relevant to deciding whether to recommend to the Commission continued use of ADR, they appear unnecessarily complex and insufficiently

targeted to the overall potential benefits of ADR as an alternative to traditional investigation and enforcement.

The industry recommends consideration of fewer criteria that more directly assess ADR's value as an alternative to traditional investigative and enforcement processes.

- The NRC could consider whether licensees and allegeders are willing to use the ADR process. This could be based on the number of complainants and licensees who have availed themselves of the program, and whether there is an increase in the proportion of those accepting ADR.
- The NRC could consider the amount of time between an allegation or proposed enforcement action and resolution under ADR versus under traditional investigation and enforcement.
- The NRC could consider participants' views regarding whether the process was efficient, effective, and satisfactory. In this regard, and because ADR may contribute to but not fully resolve disputes, even if ADR does not produce a resolution it usually narrows the issues and informs each of the parties to it. Thus, while the settlement rate is one factor to consider, it should not be considered determinative in judging in the first instance whether to continue to use ADR as part of the NRC's Enforcement Program.
- The NRC also should avoid trying to measure such broad concepts as whether the pilot promotes safety. The NRC could specifically determine whether ADR precluded or hindered the NRC in assuring licensees maintain safety. For example, in a post-investigation ADR, the NRC could assure it has not accepted lesser corrective action than it would otherwise require in traditional enforcement.

### III. Recommendations for Improvement

ADR should be available to an enlarged scope of enforcement matters. ADR should be available in response to a greater variety of allegations and proposed enforcement actions. It should be available in any proposed enforcement action against licensees, not just those involving wrongdoing or discrimination, and not just escalated enforcement. It also should be available in response to proposed enforcement actions against individuals. So, too, it should be available in response to other allegations or concerns, not just allegations of discrimination by individuals or other wrongdoing only after an investigation. If an allegeder is willing to submit his or her concern to ADR, and the licensee is willing to proceed through ADR, it can provide a worthy option for an effective, efficient, and satisfactory resolution of the concern.

In this regard, an allegeder and licensee should also be free to avail themselves of ADR at any point in the process, not just the four discrete points identified in the pilot. Especially where the

allegor is a current employee of the licensee, any time the parties voluntarily agree that an ongoing dispute has become ripe for resolution, ADR should be available to resolve the matter. The fact that the NRC may have initiated an investigation is no reason to delay or prevent willing parties to resolve their differences through ADR. Again, consistent with the use of ADR in virtually all other contexts, it should be available at any time during the more formal process.

To better facilitate a candid and timely exchange on all relevant issues, the industry has long advocated that the NRC provide licensees a copy of any report from the Office of Investigations if that report forms, even in part, the basis for a Staff proposed enforcement action. Just as the industry has recommended in the past that the OI report should be provided to a licensee prior to any pre-decisional enforcement conference, so too, any such report should be provided to a licensee at the time confronted with a choice between ADR or traditional enforcement. Consistent with the overarching goals of ADR, early access to the OI report will facilitate a more timely, efficient and effective resolution of matters in dispute. Similarly, it will help a licensee to fashion corrective action that addresses the underlying basis for the Staff's issues more directly. Failure to provide the report merely delays and obscures the identification and resolution of issues.

The use of a third-party program administrator has been highly effective. In general, the administrator has been neutral and skilled at getting the parties to focus on the likely issues to be confronted in ADR. It would be additionally beneficial for the NRC to provide the administrator with sufficient details to enable the administrator to convey the nature of the claim to the licensee. For example, as part of an early ADR involving discrimination, the NRC could provide the administrator with the results of the Staff's *prima facie* review (in a form suitable to share with a licensee). Similarly, and in general, the industry believes the mediators have been fair-minded and unbiased.

Based upon comments during the October 5, 2005 public meeting, the NRC should provide more information to an allegor considering or pursuing ADR. The NRC should explain how the agency will treat the several components of the allegation. For example, the NRC should make clear that even if the allegor chooses to pursue the discrimination component of the allegation under the ADR process, the NRC nevertheless will address the underlying safety concern (often, but not always, the protected conduct). The NRC, the third party administrator and mediator, each can help the parties set more realistic expectations for the ADR process. The brochures are helpful, but there appears to be a need for more specific guidance once the parties agree to enter mediation.

In conclusion, it is important that the NRC's evaluation consider qualitative insights together with some quantitative data. Emphasis should be placed on the ultimate objectives of the ADR pilot program—to limit workplace stress and hostility which often accompanies the more protracted traditional approach encourage parties to avoid being wed to a "win-loss" approach, and focus on the parties' common goals.

Chief, Rules and Directives Branch  
Division of Administrative Services  
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We appreciate the opportunity to provide these comments on the ADR pilot program. If you or your staff have any questions or would like to discuss our views, please call me.

Sincerely,

A handwritten signature in black ink that reads "Ellen C. Ginsberg". The signature is written in a cursive, flowing style.

Ellen C. Ginsberg

cc: Nick Hilton  
Mike Johnson  
Chip Cameron