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March 7, 2006

U.S. Nuclear Regulatory Commission
Mr. Karl L. Farrar, Esq.
Regional Counsel
475 Allendale Road
King of Prussia, PA 19406-1415

SUBJECT: REDACTED "RESPONSE TO REQUEST FOR INFORMATION REGARDING EXECUTIVE REVIEW BOARD COMMITMENTS"

This letter confirms that PSEG Nuclear LLC has reviewed the document supplied in your March 6, 2006 fax regarding the same subject matter referenced above. The review confirms that the information and redactions are consistent with our discussions. PSEG Nuclear is not requesting the NRC consider any additional actions regarding this document. If there are any questions regarding this issue, please contact me at 856-339-5429.

Sincerely,

Jeffrie Keenan
Assistant General Solicitor
PSEG Services

REPORT OF THE INDEPENDENT REVIEW TEAM

SALEM AND HOPE CREEK GENERATING STATIONS
JANUARY 2005 PERSONNEL ACTIONS

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March 17, 2005

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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?

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[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 (Mr. William Levis, Vice President, Mid-Atlantic Operations for Exelon Nuclear) and PSEG (Mr. Frank Cassidy, President and Chief Operating officer for PSEG Power, LLC, and Mr. A. Christopher Bakken, President and Chief Nuclear Officer, PSEG Nuclear LLC) met in late-December 2004 and early-January 2005. Mr. Levis 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. Mr. Cassidy and Mr. Bakken 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 Mr. Levis 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 Mr. Levis could decide whether to request the retention of a

[5] Letter from A. Randolf 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, whom PSEG described as under-performing.

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, Mr. Cassidy and Mr. Bakken understood that the ERB did not formally approve personnel decisions. Rather, the ERB process yielded either an "objection" or "no objection." Accordingly, as Chief Nuclear Officer, Mr. Bakken had the authority to act independently. For that reason, he and Mr. Cassidy saw no purpose in requesting an ERB review. Second, Mr. Cassidy and Mr. Bakken 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. Nevertheless, the absence of any clear explanation of the bases for the personnel actions has led some workers and managers to be apprehensive about the future. Additionally, the pending merger and anticipated personnel changes have caused some to seek a low profile in this time of change and uncertainty. As a result, some appear to be less willing now to raise questions or to challenge decisions, out of a concern that they may attract attention and appear in some negative light. 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.

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

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

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.[8] 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.[9] 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. . . ."[10]

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 Contact specifically provided that Exelon would provide a person to serve as the CNO.[11] 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 Creek and, based upon his understanding of the conditions at the station, began to

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7 "Straight Talk" from Chris Bakken, October 1, 2004 (Exhibit 7).
8 Interview of William Levis, Feb. 23, 2005 (Exhibit 30 (X)).
9 Levis Interview.
10 Operating Services Contract Between Exelon Generation Company, LLC and PSEG Nuclear, LLC, ("Operating Contract") at 1 (Exhibit 8).
11 Operating Contract) at 1.

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.[12]

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.[13]

Initially, Mr. Crane told Mr. Levis 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 Contact. On December 1, 2004, Mr. Frank Cassidy, President and Chief Operating Officer of PSEG Power, LLC, met with Mr. Crane and Mr. Levis to discuss implementation of the expected Operating Contact. Among other things, they discussed the timing of the personnel moves contemplated in that agreement.[14] Recognizing that the merger discussions were proceeding towards a possible public announcement later in December 2004, Mr. Cassidy proposed that the companies delay the implementation of the Operating Contract until after the conclusion of the ongoing Hope Creek outage. Mr. Cassidy 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, he proposed, and Mr. Crane and Mr. Levis agreed, to designate January 17, 2005, as the effective date for the Operating Contract.[15] Mr. Cassidy chose that date because he believed that Hope Creek would be back on-line.[16] This delay also allowed Mr. Levis additional time to identify and relocate the Exelon managers who would be moving to Salem/Hope Creek.[17]

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[12] Levis Interview.
[13] Levis Interview.
[14] Interview of Frank Cassidy, Feb. 11, 2005 (Exhibit 30 (G)).
[15] Cassidy Interview; Levis Interview.
[16] Cassidy Interview.
[17] Levis Interview.

Mr. Cassidy, Mr. Levis, and Mr. Crane 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. Given the creation of these positions, the PSEG position , would be eliminated. Although this move displaced , Mr. Crane and Mr. Levis expressed high regard for and proposed to move him to the position of . With ' assumption of these responsibilities, the PSEG incumbent in that position, was left without a position and PSEG chose to end employment with the Company.[18]

On Saturday, December 18, 2004, , met individually at the Hotel DuPont in Wilmington, Delaware, with the three adversely affected PSEG officers, disclosed the imminent announcement of the merger and the effect of the related Operating Contract on their employment with PSEG.[19]

Merger Announcement – December 20, 2004

On December 20, 2004, Exelon and PSEG announced their merger and the execution of the Operating Contact. 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 Contact on the PSEG management team. Among other things, he noted 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."[20]

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, Mr. Cassidy,

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[18] Cassidy Interview.

[19] Cassidy Interview; Interview of Chris Bakken, February 21, 2005 (Exhibit 30 (A));

[20] Straight Talk with Frank Cassidy, December 21, 2004 (Exhibit 9).

Mr. Levis, and Mr. Bakken 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.[21]

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, Mr. Levis provided Mr. Cassidy and Mr. Bakken with the identity and background of the Exelon manager whom Mr. Levis was considering for a particular position. Mr. Cassidy and Mr. Bakken then provided feedback about the performance of the PSEG incumbent to assist in the decision.

(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.[22] 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.[23] Similarly, Mr. Levis proposed to fill the vacant Salem Operations Manager position with an experienced Exelon manager, Mr. Tom Gierich. Mr. Gierich had previously served as the Operations Manager at Exelon's Byron nuclear facility.[24]

(2)

The discussions also addressed several PSEG managers whom one or more of the participants believed to be under-performing. Specifically, Mr. Cassidy and Mr. Bakken informed Mr. Levis that PSEG would likely replace . Even before this meeting, Mr. Levis had concluded that he would need an Exelon replacement for this position.[26] Either by December 22, 2004, or soon thereafter, Mr. Levis identified the new

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[21] Levis Interview.

[22] Mr. Levis may not have finally determined the identity of these Exelon officers when he first met with Mr. Bakken and Mr. Cassidy on December 22, 2004. Mr. Levis' 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.

[23]

[24] Levis Interview.

[25] Cassidy Interview.

[26] Levis Interview.

(3)

Similarly, the participants discussed the performance of . Like , Mr. Bakken had discussed Walsh's performance issues with Mr. Cassidy in October or November 2004, well before became aware of the possibility of any operating agreement with Exelon.[27] (Mr. Bakken also discussed with Mr. Cassidy the performance issues that he had with in the Fall 2004 time frame.[28]) Based on his knowledge of the performance of the , Mr. Levis agreed that he would need stronger leadership in Mr. Bakken confirmed for Mr. Levis that had been on a Performance Enhancement Plan.[29] Recognizing the need for stronger leadership, Mr. Levis had already selected two Exelon managers, positions. Rather than inserting one of these Exelon managers in the position, however, Mr. Cassidy and Mr. Bakken suggested that Mr. Levis replace with a high performing PSEG manager, .[30] Mr. Bakken indicated that was one of the two best PSEG managers on-site. (The other strong performer he identified as [31] Mr. Levis agreed to replace

(4)

Mr. Levis also took this opportunity to place his two Exelon managers in that had the potential to have a significant impact on the site's performance. Specifically, Mr. Levis knew that he needed to have new management in given the budget that the department would be managing over the next five years.[32] He considered it essential to get control of this large budget and to exercise better management in this area.[33] Accordingly, he chose to replace the incumbent PSEG manager, , with , an experienced Exelon manager whom Mr. Levis indicated could serve in a variety of [34] Mr. Bakken and Mr. Cassidy joined in that decision and noted that, under leadership, the Department had several costly overruns, including the .[35] Indeed, Mr. Bakken viewed

[27] Cassidy Interview.
[28] Cassidy Interview.
[29] Bakken Interview.
[30] Cassidy Interview; Levis Interview.
[31] Bakken Interview.
[32] Levis Interview.
[33] Levis Interview.
[34] Cassidy Interview.
[35] Cassidy Interview.

as one of the greatest challenges facing the site.[36] Mr. Cassidy also noted that his experience with in several briefings had not been positive.[37]

Given the importance of , Mr. Levis installed as the – not a manager. And given the feedback from Mr. Cassidy and Mr. Bakken about performance, as well as overall concerns about excess staffing, Mr. Levis decided not to seek another position for [38]

With the promotion of to fill position, a vacancy existed in former position, the Manager. Mr. Levis placed his other Exelon in that position.[39]

(5)

Prior to meeting with Mr. Cassidy and Mr. Bakken, Mr. Levis had also determined that he wanted to replace the incumbent Pysher.[40] He identified this need because was one of the five focus areas for the ongoing Salem/Hope Creek Business Plan, and he wanted to have an Exelon manager in that position. Accordingly, Mr. Levis identified as his new . Mr. Levis had worked with at the and knew that he had been successful in managing contract workers during outages. Mr. Levis also believed the hiring and subsequent release of contractors at was an area of potential savings.[41] Having decided to insert in that position, Mr. Levis solicited input from Mr. Cassidy and Mr. Bakken on performance. Mr. Cassidy did not know ,[42] and Mr. Bakken did not view as a particularly strong performer.[43] Mr. Bakken believed that control of the budget and personnel were weak, which had led to scheduling problems.[44] Mr. Bakken also recognized that generally Exelon performs very well in implementing , which was one of the areas of responsibilities. As a result, Mr. Bakken did not urge retention.[45]

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[36] Bakken Interview.
[37] Cassidy Interview.
[38] Levis Interview.
[39] Levis Interview.
[40] Levis Interview.
[41] Levis Interview.
[42] Cassidy Interview.
[43] Bakken Interview.
[44] Bakken Interview.
[45] Bakken Interview.

(6)

Similar to the circumstances triggering replacement, Mr. Levis had also identified an Exelon manager, , to play a key role in improving – another of the ongoing focus areas in the PSEG Nuclear Business Plan.[46] Mr. Levis believed that more effective would contribute significantly to better performance, and he knew from work at , where had performed very well in a variety of manager positions, including a supervisory position .[47] Additionally, Mr. Levis considered addition to the Salem/Hope Creek managerial ranks as providing an added benefit .[48] Having decided to replace the PSEG incumbent , Mr. Levis again solicited feedback on performance from PSEG. He learned from Mr. Cassidy and Mr. Bakken that had a strong background in , and was an overall good performer.[49] Based on this input, Mr. Levis opted to retain even though Mr. Levis had not identified a particular position for him.

(7)

The officers also discussed two potential moves in the . Again, Mr. Levis had already identified Exelon managers for insertion into the organization. Specifically, Mr. Levis knew that was available to serve as the He was also aware that Exelon had tried to get the PSEG incumbent, to accept an exchange position with Exelon at its in the Fall of 2004, but had declined. Mr. Levis had hoped to have serve as the . In discussing , Mr. Bakken spoke highly of his talents. In particular, Mr. Bakken recognized "hands on" approach, as well as his communications and positive relationship with his workers.[51] Mr. Bakken noted, however, that despite strengths, he also had certain areas which could be improved, and continued to be a challenge.[52] Mr. Bakken's generally favorable assessment of , and , need for a person with talents, caused Mr. Levis, Mr. Bakken, and Mr. Cassidy to agree that temporary reassignment to would serve well, while allowing Mr. Levis to install an experienced and senior Exelon manager, , as the new . On a personal level, these officers also believed that

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[46] Levis Interview.
[47] Levis Interview.
[48] Levis Interview.
[49] Levis Interview; Bakken Interview.
[50] Levis Interview.
[51] Levis Interview.
[52] Bakken interview; Levis Interview.

assignment to would assist in his professional development, shorten his commute, and allow him to attend to at home.[53]

(8)

The second change in the affected the incumbent . Similar to the circumstances affecting , Mr. Levis had identified an Exelon manager to assume responsibilities.[54] This person was returning to Exelon from a temporary assignment to and Mr. Levis believed his skills to be a good fit for the job.[55] After disclosing his intention to install this person in position, Mr. Levis received generally positive feedback from Mr. Bakken on performance.[56] Although in this initial meeting, Mr. Levis decided to replace he opted to retain him in the organization, even though he had not yet identified a particular position. Thus, were in essentially the same position – displaced, but retained and not assigned.

(9)

The discussion about one PSEG manager does not conform precisely to the manner of the discussions described above, *i.e.*, where Mr. Levis had either a specific replacement identified or knew of a particular area for insertion of an Exelon manager, and then received feedback from Mr. Bakken and Mr. Cassidy about the performance of the PSEG incumbent. The unique PSEG manager was

Because the Exelon management model does not include a position, Mr. Levis did not have a clear understanding of the responsibilities of the position.[57] Mr. Levis understood that played a significant role in the in the late-1990s, but Mr. Levis had not determined that the imposition of the was necessarily the best model to be used to improve performance at Salem/Hope Creek. For these reasons, he had not identified an Exelon manager to replace when he met with Mr. Cassidy and Mr. Bakken to discuss other management changes.[58]

Nevertheless, Mr. Bakken raised continued employment as an issue at the meeting because he felt that had not performed at a sufficiently high level in his role as the . Mr. Bakken informed Mr. Levis that he believed

[53] Levis Interview.
[54] Levis Interview.
[55] Levis Interview.
[56] Levis Interview.
[57] Levis Interview.
[58] Levis Interview.

that would be amenable to a voluntary severance and that he would pursue that topic with .[59] Mr. Cassidy noted that he had also observed when served on the earlier in 2004 and that he did not regard as a strong performer.[60]

Preparations for Severance

After Mr. Cassidy, Mr. Levis, and Mr. Bakken concluded their initial discussions about these potential personnel changes on December 22, 2004, Mr. Cassidy invited Mr. Vincent D. Labbate, Director – Human Resources for PSEG Power LLC, to join them in their meeting. Mr. Cassidy informed Mr. Labbate that Exelon would be installing a number of its managers in various positions at Salem/Hope Creek, pursuant to the Operating Contract. Mr. Cassidy also told Mr. Labbate that he should prepare appropriate severance packages for five PSEG managers – Messrs. – to be effective January 17, 2005. Additionally, Mr. Cassidy told Mr. Labbate to expect the Exelon managers to be on-site on January 10, 2005.[61]

Mr. Bakken Meets with – January 4, 2005

Consistent with Mr. Bakken's remarks in his meeting with Mr. Cassidy and Mr. Levis on December 22, 2004, Mr. Bakken met with to discuss severance on January 4, 2005. Mr. Bakken advised that Mr. Bakken was being replaced by Mr. Levis. Mr. Bakken also remarked that he was uncertain of the future of the under the Exelon model and that he was also uncertain about , in particular.[62] , too, expressed concern about the "fit" between the and the Exelon model.[63] Mr. Bakken then offered the severance documents (a General Waiver and Release) that had been previously prepared at the direction of Mr. Labbate, to be effective January 17, 2005.[64] In this meeting, Mr. Bakken informed that he did not have to accept severance and that he could elect to remain with the Company and "take his chances" in the new organization.[65] He and also discussed the possibility of extending the termination date beyond January 17, 2005.[66]

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[59] Bakken Interview; Cassidy Interview; and Levis Interview.
[60] Cassidy Interview.
[61] Interview of Vincent Labbate, Feb. 11, 2005 (Exhibit 30 (U)).
[62] (C)); Bakken Interview.
[63]
[64]
[65] Bakken Interview.
[66] Bakken Interview;

Mr. Bakken's Follow-up Discussions – Week of January 3, 2005

During the first week of January, 2005, Mr. Bakken had several meetings to follow-up his discussions with Mr. Cassidy and Mr. Levis. In particular, Mr. Bakken discussed the pending severance of the five PSEG managers with , who urged Mr. Bakken not to terminate their employment. recommended addressing their performance issues through the performance management process.[67] Mr. Bakken also spoke to , an Exelon employee who was serving as the Mr. Bakken recalls indicating that he would like to retain .[68] Given this feedback from and , Mr. Bakken informed Mr. Labbate that he may not need severance packages for all five PSEG managers. Mr. Bakken mentioned that he was having discussions on this topic with and [69]

Severance Plans Confirmed – January 5, 2005

On January 5, 2005, requested that he be permitted to remain until March 28, 2005, at which time, he would accept the severance offered.[70]

Given this request and the uncertainty surrounding the circumstances of , Mr. Bakken spoke to Mr. Levis and Mr. Cassidy on January 5, 2005. According to Mr. Bakken, Mr. Levis indicated that he believed that it would be best to sever those PSEG employees who were being replaced and who had been identified by Mr. Bakken and Mr. Cassidy as having performance issues.[71] Mr. Cassidy also recalls that Mr. Bakken indicated that he recommended keeping , but that Mr. Cassidy and Mr. Levis disagreed.[72]

Mr. Bakken recalls Mr. Levis indicating that it would be better to have leave at the same time as the others, even though Mr. Levis did not intend to replace .[73] Mr. Levis does not recall having this specific conversation about the timing of 's termination. Mr. Levis understood, however, that would be severed, under an enhanced PSEG severance package during this same time period.[74] Mr. Bakken then called Mr. Labbate to inform him of the need for the appropriate severance documents. Mr. Labbate also recalls receiving a call from Mr. Cassidy confirming the identity of the five PSEG managers to be terminated and instructing Mr.

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67 Bakken Interview.
68 Bakken Interview.
69 Labbate Interview. In Mr. Bakken's interview, he recalled the essence of this conversation, but recalled asking Mr. Labbate to only prepare a severance package for
70 Bakken Interview; recalls informing Mr. Bakken of this extension request the next day, January 6, 2005.
71 Bakken Interview.
72 Cassidy Interview.
73 Bakken Interview.
74 Levis Interview.

Labbate to be on-site on Thursday, January 6, 2005, to conduct the terminations of . Mr. Labbate understood that Mr. Bakken had already discussed severance with [75]

Notification to the Adversely Affected PSEG Managers – January 6, 2005

As instructed, Mr. Labbate met with in the afternoon of January 6, 2005, to inform them of their severance and to provide them with the appropriate documents.[76] He also met briefly with to provide him with another version of the severance documents. This version changed the separation date from January 17 to January 14, 2005.[77]

Additionally, all but one of the PSEG managers who were being replaced – but not separated – also received notice. Specifically, Mr. Bakken met on January 6, 2005, with and advised him that he was being assigned to , where he would be the . He also told that an Exelon manager would replace him as the was upset by the transfer, which he considered a demotion. Mr. Bakken, however, understood that Mr. Levis intended to have eventually serve as the .[78] When asked if he had the option of declining the position, Mr. Bakken informed him that the assignment was not voluntary and if he declined the assignment, his employment could be terminated.[79]

Mr. Bakken also informed that was also being replaced as the He asked to inform of this change. Mr. Bakken did not know what assignment would receive.[80] advised of this information later that day.[81]

Mr. Bakken also called , who had been slated to serve as the , to inform him that he would not take over that position upon his return from his assignment. He advised that Exelon had not provided him with an assignment as of that date, but that should "sit tight" until such time.[82]

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

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[75] Labbate Interview.
[76] Labbate Interview.
[77] 1).
[78] Bakken Interview.
[79] v.
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[82] Bakken Interview.

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.[83]

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. learned of his replacement on January 7, 2005, shortly before an "all-hands" meeting to announce the changes. , an Exelon manager who had been serving as the in the Fall 2004 exchange program, told that he was being replaced, but that he would remain with the Company in a position that had not yet been identified.[84]

On the morning of January 7, 2005, PSEG announced the personnel changes to the workforce.[85]

B. Chronology of Relevant Events Related to the ERB

As noted earlier, on December 22, 2004, Mr. Cassidy told Mr. Labbate to prepare severance packages for five PSEG managers – . Mr. Labbate, a member of the ERB, asked Mr. Cassidy if the ERB would review these terminations. Mr. Cassidy indicated that they would not, given the circumstances. Although Mr. Labbate did not ask Mr. Cassidy to explain, he knew that the CNO, Mr. Bakken, was one of the decision makers and, as the CNO, Mr. Bakken had the authority to act independent of an ERB recommendation. Mr. Labbate did not express any disagreement to Mr. Cassidy with this approach.[86]

In the days following the December 22, 2004, meeting between Mr. Cassidy, Mr. Bakken, and Mr. Levis, Mr. Bakken informed Mr. Brothers that the influx of approximately 24 Exelon managers would lead to the termination of some unknown number of PSEG managers. By the end of that week, Mr. Brothers understood that three PSEG managers might be terminated, advised Mr. Bakken that, in opinion, the ERB would need to review these actions.[87]

Consideration of a potential ERB review of these personnel decisions resumed on January 5, 2005. On that day, Mr. Brothers told Mr. Cassidy that an ERB review of the

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[83] Press Release, "Exelon Corporation Prepares to Provide Operating Services For PSEG Nuclear Plants," Jan. 6, 2005 (Exhibit 12).

[84] ( ).

[85] Questions and Answers, January 7, 2005 (Exhibit 13).

[86] Labbate Interview.

[87] . Bakken Interview.

pending decisions was required.[88] Mr. Cassidy replied that the merger and the related Operating Contract created an extraordinary condition, which was outside the circumstances contemplated by the ERB.[89] Additionally, Mr. Cassidy noted that the ERB Chairpersons, Mr. Brothers and Mr. Carlin, were adversely affected by the personnel decisions and would not be in a position to chair the ERB, if one were held. Mr. Brothers informed Mr. Cassidy that he did not agree with that view.[90]

Also on January 5, 2005, Mr. Brothers spoke to Mr. Levis, who asked Mr. Brothers if the ERB constituted a commitment to the NRC.[91] Mr. Brothers replied that the precise commitment was set forth in a PSEG letter to the NRC. He also informed Mr. Levis that he believed an ERB was required.[92]

Given Mr. Brothers' various conversations about the ERB, he wrote an e-mail to Mr. Cassidy and Mr. Bakken on the evening of January 5, 2005, memorializing his opposition to proceeding with the personnel actions without an ERB.[93]

After the announcement of the personnel changes on Friday, January 7, 2005, Mr. Eugene Cobey, a NRC Branch Chief at Region I, met with Mr. Brothers to ask about the personnel moves and to find out if the ERB had reviewed the decisions. Mr. Brothers informed him that the ERB had not reviewed the actions.[94] Later that same day, Mr. Cobey called Mr. Brothers 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?"[95] Mr. Brothers then passed this message to Mr. Bakken.[96]

Mr. Brothers also spoke to Mr. Levis on January 7, 2005, to inform Mr. Levis of the NRC's concern and Mr. Brothers' belief that the ERB should have reviewed the recently announced personnel actions. Mr. Levis 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.[97]

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[88] Cassidy Interview.
[89] Cassidy Interview.
[90] Cassidy Interview.
[91] Brothers Interview.
[92] Brothers Interview.
[93] E-mail from M.H. Brothers to A.C. Bakken and F. Cassidy re: Upcoming Changes, Jan. 5, 2005 (Exhibit 14).
[94] Brothers Interview.
[95] Handwritten notes of M.H. Brothers (Exhibit 15). Note: These notes reflect a later conversation between Mr. Brothers and Mr. Cobey in which Mr. Cobey asked why PSEG had not yet responded to this earlier question, posed originally on January 7, 2005. *See* Brothers Interview.
[96] Brothers Interview.
[97] Levis Interview.

Over the weekend, Mr. Bakken and Mr. Brothers discussed the possibility of conducting an "after-the-fact" ERB review of the personnel actions.[98]

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.[99] Mr. Bakken confirmed Mr. Brothers' 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 existed, given PSEG's ability to change its Business Plan by providing quarterly notice to the NRC. Second, Mr. Bakken felt constrained by the Operating Contract, which, in his view, entitled Exelon to install its managers in the organization. Third, Mr. Bakken noted that as the CNO, he had ultimate responsibility for the personnel actions and could act independent of an ERB recommendation. As a result, he saw no point in the ERB review. Finally, Mr. Bakken noted the practical difficulty of conducting an ERB with the two Chairpersons and the SCWE Manager adversely impacted by the decision that would be the subject of the ERB review.[100] Nevertheless, in this discussion, Mr. Bakken agreed to have an "after-the-fact" ERB review of the decisions.

Mr. Bakken then informed Mr. Levis of this decision.[101] Mr. Levis felt that the Company should perform some assessment to ensure there was no violation of 10 CFR § 50.7, but he believed an after-the-fact ERB posed many practical problems, given the impact on several of the key ERB members [102]

On Thursday, January 13, 2005, Mr. Brothers told Mr. Thomas Lake, the SCWE Leader under Mr. Bergh, to submit a Notification in the Corrective Action Program, noting that the personnel decisions announced as part of the implementation of the Operating Contract did not receive an ERB review.[103] After writing the Notification, Mr. Lake began to perform the screening reviews in anticipation of participating in an after-the-fact ERB.[104]

In preparation for a possible after-the-fact ERB, on January 18, 2005, Mr. Brothers asked Mr. Bakken if he would serve as the presenter at the ERB to explain the bases for the personnel actions. Mr. Bakken declined, indicating that he was not the decision maker for most of the personnel moves.[105] Rather, he advised Mr. Brothers that

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[98] Brothers Interview.
[99] Bakken Interview.
[100] Bakken Interview.
[101] Levis Interview.
[102] Levis Interview.
[103] Notification 20219535, January 13, 2005 (Exhibit 16); Brothers Interview; Interview of Thomas Lake, Feb. 1, 2005 (Exhibit 30 (V)).
[104] Lake Interview.
[105] Brothers Interview; Bakken Interview.

he was only principally responsible for termination, and to a lesser degree, the terminations of [106]

The issue remained unresolved. On Thursday, January 20, 2005, i

. 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.[107] At this meeting, Mr. Brothers opposed the notion of conducting the review, believing that the outcome would be pre-determined.[108] disagreed, noting that, although not ideal, an ERB review could be objective and would demonstrate compliance (albeit late compliance) with the process.[109] 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.[110] After the conclusion of that meeting, Mr. Brothers reconsidered his position and agreed to conduct an after-the-fact ERB, as long as the outcome was not predetermined.[111]

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.[112]

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;

(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.

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[106] Brothers Interview.

[107] ; Brothers Interview.

[108] Brothers Interview.

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[111] Brothers Interview.

[112] 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.

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, Mr. Lake began a review in January 2005, when requested by Mr. Brothers, in anticipation of conducting an "after-the-fact" ERB.[113] As requested by the Review Team, Mr. Lake completed his review and provided a written response.[114] Mr. Lake concluded that each of the terminated managers engaged in protected activity. Mr. Lake also performed a screening review for [redacted], whose potential transfer to [redacted] in September 2004, the ERB rejected. Mr. Lake's recent review substantiated the existence of [redacted] protected activity.

[113] The results of Mr. Lake's preliminary screening reviews appear as Exhibit 17.
[114] The results of Mr. Lake's completed screening reviews appear as Exhibit 18.

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 Mr. Cassidy, Mr. Bakken, and Mr. Levis 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, replacement never arrived. As a result, served continuously as the until his voluntary departure from the Company in 2005.

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.[115] Likewise, suffered adverse action because he was reassigned from the position of , a position with fewer responsibilities. Moreover, given the transfer of the

[115] A Letter from Chris Bakken, "Changes Announced," Jan. 6, 2005 (Exhibit 19).

functions from . ' current responsibilities in this position are less substantial than those held by his predecessor,

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 – Mr. Cassidy, Mr. Bakken, and Mr. Levis – 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 CNO, Mr. Bakken 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 was not distinguished 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 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."[116]

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

[116] Operating Contract, Section 3.1.1.

Salem/Hope Creek. With a tentative roster of qualified and available Exelon managers and an understanding of the needs of the organization, Mr. Levis then met with Mr. Cassidy and Mr. Bakken 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 an under-performing PSEG manager. In these cases, the views of Mr. Cassidy and Mr. Bakken 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 Performance Issues

Mr. Bakken believed that it was important for him to not send forward to Exelon key managers whom he regarded as having significant performance shortcomings.[117] He placed three managers in this category – Accordingly, he and Mr. Cassidy informed Mr. Levis of their concerns about the performance of each of these managers in their discussions. Before hearing their views, however, Mr. Levis had already decided to replace and, probably, based upon his personal observations and awareness of the performance of [118]

The performance appraisals of and confirm that both were not performing at expected levels. On August 12, 2004, received a mid-year evaluation that included in the ten "Behavioral Indicators."

[117] Bakken Interview.
[118] Levis Interview.

Specifically, he received [illegible] in the following areas: Creates and sustains a Safety Conscious Work Environment; Operates from a whollistic view; Inspires others to action; Engenders respect and trust; Executes and Establishes accountability.[119] Given these ratings, he received an overall rating of [illegible] for his mid-year behavior score and was placed on a [illegible].[120]

Among other things, that [illegible] required [illegible] "to improve his leadership, most notably delivering on commitments. . . ." It also required him to "own" and use the [illegible] to "create accountability for improvements that are required in [illegible] also addressed [illegible] need "to improve the interface between [illegible] [and to] project himself as a key leader of the site and create better partnerships with [illegible] to create more intensity and spirit around making the necessary changes to restore employee and public confidence."[121]

[illegible] most recent performance evaluation also identified a number of areas in which he was [illegible]. For example, [illegible] received three "unsatisfactory" and two "marginal" ratings in the five "core job objectives." In explaining these ratings, his rater [illegible] noted among other things: (a) "numerous missed commitments remain the norm for [illegible] (b) "tagging issues and poor supplemental workforce oversight have not been adequately addressed;" (c) "safety performance and configuration control have been poor during [illegible]:" and (d) the recent outage was "the worst outage that [illegible] [has] ever seen."[122] Likewise, of the ten behavioral attributes evaluated, [illegible] received [illegible] ("[illegible]") and [illegible]," "Sustains high energy," "Maintains a competition spirit," and "Establishes accountability.")

Summing up [illegible] wrote:

> [S]ince I have been here, [illegible] has not met a single schedule related to downpower(s) or outage . . . . There is no obvious accountability and minimal utilization of performance management to resolve the lack of predictability.
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> * * * *
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> By virtually every measure, the performance of [illegible] for 2004 was [illegible].

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119 [illegible]

120 [illegible].

121 *Id.*

122 [illegible]

Mr. Cassidy shared Mr. Bakken's and ' views about the performance of both managers and was aware of the existence of [123] Notably, concerns about the performance of r. pre-date the merger and related personnel discussions with Mr. Levis.

There is no evidence that indicates that any protected activity played any part in the severance of . Indeed, neither have asserted that protected activity contributed to their terminations.[124] In fact, as a expected that he would be terminated upon implementation of the Operating Contact.[125]

Finally, some interviewees reported hearing an assertion that those managers with prior service as Exelon employees, like , were targeted for replacement or termination.[126] 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.

Mr. Bakken also believed that position and performance would limit his success with Exelon. In particular, Mr. Bakken cited difficulties in producing a high quality draft to the NRC. Mr. Bakken noted that the report contained erroneous data, typographical errors, a faulty format, and was generally unacceptable. Mr. Bakken indicated that he had to spend several days personally working on the report and associated cover letter to ensure that it met his standards.[127] Mr. Bakken also felt that had not provided visible leadership in his role as the [128]

Additionally, Mr. Bakken was uncertain of the role that the would play in the Exelon model. Accordingly, he told that he was skeptical about the organization's long-term future, and also future.[129] shared these concerns about the future with during the first week of January 2005, who concurred, and suggested to that he ask Mr.

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[123] Cassidy Interview;

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[127] Bakken Interview.

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Bakken for a severance package.[130] recalled concluding that he did not "have a place" in the future organization.[131]

Unlike , however, was not on a and Mr. Bakken's views about performance were not shared by all of his fellow officers. For example, Mr. Brothers believed that was a strong performer who had the potential to be a plant manager.[132] also thought highly of .[133] In fact, believed that temporary assignment as the after having served as the , would provide with a position of high visibility from which he could showcase his skills.[134] acknowledged, however, that had not really performed at the high level that had anticipated. observed that had done a good job "managing," but not "leading" as the .[135] and Mr. Brothers discussed performance and noted that Mr. Bakken "was not that high" on [136]

Mr. Cassidy also shared Mr. Bakken's assessment of . Mr. Cassidy had observed in his work on the in the first half of 2004 and was not impressed with his performance.[137]

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

First, even before Mr. Bakken assumed his position as CNO, and before became the , Mr. Bakken's predecessor, Mr. Roy Anderson, raised questions about performance as the . Mr. Anderson even told a contractor, , that he was not pleased with performance.[138]

Second, as noted above, Mr. Bakken's observations of 's performance were not unique. Mr. Cassidy also considered to be under-performing. Even strong supporters, Mr. Brothers and , acknowledged at least some of Mr. Bakken's observations. They clearly did not view deficiencies to be

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132 Brothers Interview.

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137 Cassidy Interview.

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as noteworthy as Mr. Bakken, but they recognized the basis for his criticism. Although neither Mr. Brothers nor viewed performance as fatal or even reflective of his overall performance, Mr. Bakken's criticism was not contrived.

For example, Mr. Brothers and acknowledged that Mr. Bakken did not regard as an effective leader.[139] was aware long before these personnel discussions began in late-December 2004 that Mr. Bakken did not regard as providing dynamic leadership as the [140] Although did not regard this fact as generally characteristic of Mr. Bergh's overall performance, he acknowledged that Mr. Bakken's observation was not entirely without merit.[141] Given Mr. Bakken's concern, Mr. Brothers advised that Mr. Bakken did not see the "value" that brought to the position of the .[142] And acknowledged that he was frustrated that he had not been able to "break through" with Mr. Bakken.[143]

Mr. Brothers' comments on 2004 mid-year performance evaluation corroborate several of Mr. Bakken's critical observations. For example, in rating performance as in the "core job objective" of "achiev[ing] substantive progress toward the desired customer of the ," Mr. Brothers noted that "timelines and schedule adherence must still be improved. . . ." As substantiation for this comment, Mr. Brothers observed that some activities "failed to meet the scheduled dates." Mr. Brothers also rated Mr. Bergh as " " in the behavioral indicators of "sustains high integrity," "executes," and "establishes accountability." Overall, Mr. Brothers rated performance as "satisfactory," but urged him to "become more aggressive and exhibit a stronger drive and persistence to overcome obstacles and achieve results." He also urged to complete work in a timely manner, noting that the first and second quarter were issued after their due dates.[144]

Again, Mr. Brothers' evaluation of does not describe the performance of a failed manager. To the contrary, Mr. Brothers compliments performance in a number of areas. But the significance of this evaluation is that it corroborates some of the criticism rendered by Mr. Bakken about performance. Notably, both Mr. Brothers and Mr. Bakken cited a lack of visible, aggressive leadership and, at times, missed deadlines. In so doing, Mr. Brothers' observations refute any suggestion that Mr. Bakken's views arose from some protected activity.

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Additionally, in December 2004, before the announcement of the merger with Exelon and the initiation of discussions with Mr. Levis, Mr. Bakken had informed Ms. Margaret Pego, Vice President, Human Resources for PSEG Services Corporation, that he would soon be recommending separation from PSEG because, based on performance as the , he did not believe that had a future in the organization.[145] (At the same time, Mr. Bakken advised Ms. Pego that he would also be recommending the termination of [146]) Accordingly, he informed her that he would be seeking her assistance in the future to address this issue. At that point, however, Mr. Bakken had not taken the steps under the normal performance management process to terminate on the basis of sub-standard performance. For example, he had not placed on a Performance Enhancement Plan.[147]

Others, at lower levels of the organization, as well as consultants, were also aware that Mr. Bakken did not have a high regard for performance. For example, , heard say that Mr. Bakken was "no big fan" of [148] Likewise, , a consultant hired by the Company to assist in its efforts to improve the work environment, noted that Mr. Bakken spoke derisively at times about [149]

Mr. Bakken's longstanding and consistent opinion about performance 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 believes may have led to his separation.

Specifically, on several occasions during November and December 2004, intervened in the management of a contractor who had engaged in protected activity. intervention placed him in a somewhat adversarial, although "cordial,"[150] position with an Exelon manager, who had been on-site as part of the 2004 exchange program between Exelon and PSEG. involvement in this issue led him in December 2004 to direct that the Exelon manager no longer interact with, or serve in a supervisory capacity over, the contractor. also provided candid counseling to the Exelon manager about several aspects of the manager's behavior – behavior that believed to be inappropriate. Among other things, was concerned about the manager maintaining a supervisory file only on the contractor

[145] Interview of Margaret Pego, Feb. 11, 2005 (Exhibit 30 (AA)).
[146] Pego Interview.
[147] Pego Interview.
[148]
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and not others. On December 17, 2004, the issue came to a head, and asked the manager for the file, which retained until his termination.[151]

believes that his encounters with this Exelon manager may have contributed to his selection for termination.[152] Several facts refute this belief. First, when briefed Mr. Bakken about his coaching of this manager in November 2004, indicated that Mr. Bakken received the information favorably and thanked for doing his job.[153] In other words, Mr. Bakken showed no sign that he considered intervention to be troublesome or problematic. So too, when briefed Mr. Brothers on his work with this manager, Mr. Brothers supported [154] There is no indication that work with this manager contributed in any way to Mr. Bakken's negative assessment of performance. Moreover, Mr. Bakken had expressed his disappointment about performance long before the issue came to a head with this manager on December 17, 2004. As noted earlier, Mr. Bakken had previously asked Ms. Pego to assist him in severing for performance.[155]

Finally, the manager with whom "locked horns"[156] did not provide any input to the decision makers, Mr. Bakken, Mr. Cassidy, or Mr. Levis.[157] In particular, he did not speak about , or performance, with any of the three executive decision makers or his fellow Exelon managers.[158] In fact, Mr. Levis 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 Mr. Levis into the personnel decision announced on January 7, 2005.[159]

In conclusion, the preponderance of the evidence indicates that protected activity did not contribute to Mr. Bakken's decision to offer severance to

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(B) Replacing Managers in Key Positions

A 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 Mr. Cassidy and Mr. Bakken, 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 Mr. Hughes, Mr. Pysher, Mr. Pike, Mr. Hanley, and Mr. Campbell.

Before meeting with Mr. Cassidy and Mr. Bakken, Mr. Levis had decided to install an Exelon manager in the position.[160] Mr. Levis knew that the five-year budget for that organization was an . According to , his budget exceeded the budget for .[161] Apart from the management of that budget, Mr. Levis knew that the budget reflected a number of very important projects. Among those were projects addressing the [162] 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 [163] The elevation of this position from a position reflected the importance that Mr. Levis placed on this position.

Mr. Bakken and Mr. Cassidy concurred in Mr. Levis' action, noting that ' organization had experienced some difficulty bringing in some on budget. Indeed, Mr. Bakken considered to be an area in need of significant improvement. With this input, Mr. Levis indicated that he did not have a place for . 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 Indeed, the topic of protected activity simply never arose in their discussions, and Mr. Levis had no knowledge of any particular protected activity engaged in by . Nor did . 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.

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[160] Levis Interview.
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[163] Levis Interview.

Rather, he considered it a business decision, because he managed [164] Clearly, Exelon had a legitimate business interest in having an experienced Exelon manager oversee the budget of such an important area.

The circumstances surrounding the severance of mirror those of . In fact, worked closely with organization, by providing the [165] Thus, the need for control of the management of meant that Exelon also needed to install new management in the organization. For this reason, Mr. Levis also knew that he would replace with an experienced Exelon manager. In this case, he chose , a person with whom Mr. Levis had previously worked and a person whom Mr. Levis knew had been successful in a similar position.[166] Although Mr. Levis did not discuss his selection of with , . had worked with at , where believed that had performed very well.[167]

Again, Mr. Levis' assessment of the site's needs was consistent with the feedback provided by Mr. Cassidy and Mr. Bakken. In this instance, PSEG had previously designated as a focus area in its Nuclear Business Plan.[168] Installing proven leadership in this area would allow Exelon to improve a known area of weakness and capitalize on a new management model that Mr. Bakken understood to be a particular Exelon strength.[169] Because neither Mr. Cassidy[170] nor Mr. Bakken[171] urged Mr. Levis to find a position for , he was not retained.[172]

As in the case of , the decision makers did not discuss any protected activity engaged in by The topic never arose. Indeed, Mr. Levis did not even know .[173] Moreover, does not believe that any protected activity affected the decision to offer him severance.[174] Accordingly, there is no reason to believe that any protected activity engaged in by played a part in his severance.

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166 Levis Interview.

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

169 Bakken Interview.

170 Mr. Cassidy did not have much, if any, personal experience with . (*See* Cassidy Interview.)

171 Mr. Bakken had previously told Mr. Brothers that he considered to have some performance issues. (*See* Brothers Interview.)

172 Mr. Carlin noted that had had difficulty managing contract craft workers (Carlin Interview).

173 recalled Mr. Levis telling him that he did not know either or . (*See*

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Consistent with the process and logic of the decisions affecting , and , business reasons led Mr. Levis to replace with Mr. Levis believed that site performance could be improved with better – another one of the five focus areas in the current PSEG Nuclear Business Plan. He knew t had performed well in a position at believed that could apply Exelon's work planning model to improve performance at . He also saw transfer to as providing needed among the management team.

Unlike the circumstances of and , Mr. Bakken spoke highly of overall performance and his versatility, having a strong experience in and an . Based upon this information, Mr. Levis requested that PSEG retain , even though Mr. Levis had not identified a particular position for him at the time of the personnel changes.

These legitimate business reasons – not any protected activity – prompted replacement. And, as in the cases of and , has no reason to believe that any protected activity led in any way to his replacement.[175] Although wrote several Notifications, he does not believe that any were a source of frustration or concern to management.[176]

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

In evaluating the , Mr. Levis identified two experienced Exelon managers to assume the positions of (former position) and position). He identified the need to replace management in this organization because of the longstanding difficulties associated with maintaining the Salem plant. As Mr. Carlin observed, was well known to be an area of weakness and high expense.[177] Mr. Levis 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. Although not all problems were the personal responsibility of either , the plant's challenges were well known and documented.

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In his search for an Exelon manager to assume s position, Mr. Levis identified a qualified manager returning from an . As in the case of , Mr. Bakken spoke highly of . skills, and he recommended that Exelon find a position for Mr. Levis was willing to do so, but at the time of the January 7, 2005 announcement, he had not identified a particular position for

designated replacement had a shortly before his arrival at . which precluded his acceptance of the re-assignment.[180] As a result, remained as the 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 . Accordingly, he remained in his original position. Given his performance, Mr. Levis decided to keep in the position.[181]

There is no evidence that Mr. Levis sought to replace for any protected activity. Rather, Mr. Levis, Mr. Cassidy, and Mr. Bakken believed that Salem's performance could be improved by the introduction of new management in the and, for that reason alone, they chose to replace Mr. Bakken's support for through his positive assessment of performance to Mr. Levis contradicts any notion that he bore ill will for any protected

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[180] Levis Interview.

[181] Levis Interview.

activity engaged in by Similarly, Mr. Levis' decision to retain in his original position provides convincing evidence that Mr. Levis lacked a retaliatory motive. Indeed, Mr. Levis was not aware of any specific protected activity engaged in by and, as in the discussions about the other managers, the topic never arose. Finally knows of no information which suggests that his aborted replacement arose because of any protected activity.[182]

As discussed above, Mr. Levis recognized the need to address longstanding issues at Salem. Part of his solution included the selection of a senior Exelon manager, , to head the . Apart from knowledge and familiarity with the Exelon Management Model, had previously served as the . In this position, he had successfully managed a large organization, overseeing subordinate managers in a number of diverse disciplines.[183]

When the three executive decision makers met on December 22, 2004, to discuss the upcoming personnel moves. Mr. Levis already knew that he wanted to place position.[184] He was also aware that in the Fall of 2004, had initially expressed interest in taking an exchange assignment as the .[185] later rejection of that assignment precluded that move.[186]

rejection of that assignment was a disappointment to Mr. Bakken.[187] Mr. Bakken had encouraged – but not required – to accept the earlier assignment for several reasons. First, he believed that would benefit professionally by exposure to Exelon's management. Second, he believed that Exelon would benefit by having manage an important function at , that could capitalize on strengths. Third, he believed that it was important for the PSEG/Exelon exchange program to be successful. In fact, PSEG expected the seven Exelon managers who came to Salem/Hope Creek to be instrumental in improving overall station performance. Mr. Bakken was concerned that if PSEG did not cooperate to the same degree as Exelon had, by providing highly qualified PSEG managers to Exelon, the exchange program might be in jeopardy. Finally, Mr. Bakken believed that assignment to would ease somewhat .[188]

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[183] Levis Interview.
[184] Levis Interview.
[185] Levis Interview.
[186] Levis Interview.
[187] Bakken Interview.
[188] Bakken Interview.

With this background, Mr. Cassidy, Mr. Bakken, and Mr. Levis considered replacement by to be another opportunity to achieve the benefits they had hoped to secure earlier. Mr. Bakken, in particular, believed assignment to could ultimately be a significant professional benefit to [189] Mr. Levis also considered the assignment to be an endorsement of skills. Mr. Bakken's praise for knowledge, work ethic, communication skills, and his strong relationship with his subordinates, supported Mr. Levis' belief that was a potential successor to the , a person whom Mr. Levis was considering replacing.[190] Given the sensitivity of this issue, was not made aware of his potential assumption of the position. Mr. Levis disclosed his intentions, however, to Mr. Bakken and Mr. Cassidy.[191]

arrival in would not only allow to take a job that would play to his strengths, it would also allow Mr. Levis to shore up some of the documented weaknesses in the As discussed earlier, the recent t. And, although was an overall satisfactory performer, he was not without his shortcomings.

Specifically, performance evaluation for 2004 identifies several areas in which the fell short. For example, had difficulty throughout 2004 meeting Corrective Action goals. Additionally, oversight of , in 2004 was "poor." Generally, did not meet "established industry standards for practices and safety." Finally, evaluation noted that had not "fully engaged" his front-line supervisors, which placed significant personal and professional burdens on [192]

The identification of these areas does not mean that was failing as the He was not. In fact, the evaluation noted several areas of his performance that improved during the second half of the rating period. And, as noted earlier, he received a "satisfactory" overall rating.

Nevertheless, these under-performing areas show that Mr. Levis' focus on the has a legitimate basis. In other words, the "longstanding difficulties" in that Mr. Levis noted as a basis for installing new leadership were well documented and were not used as a pretext for retaliation.

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[189] Bakken Interview.
[190] Levis Interview.
[191] Bakken Interview; Cassidy Interview.
[192]

It was for these positive (and legitimate business) reasons that was transferred to the

however, does not accept this. Instead, he believes that management in retaliation for having engaged in protected activity. To support his contention, asserts that he often took positions on issues which required management to take more comprehensive corrective action than originally planned.

Rather, he urged the use of more definitive measures to prevent recurrence. also believes that his articulation of the lack of effective support that he received from the prompted his transfer. Additionally, believes that his strained relationship with the , and, at times, , contributed to his replacement and transfer.

Unquestionably, engaged in protected activity – some of which was quite visible.[194] Unquestionably, his relationship with some other managers was not ideal. But the people whom believes caused his replacement played no role in the decision making, either directly or indirectly.[196]

In fact, the person chiefly responsible for his transfer, Mr. Bakken, is an ardent supporter of . According to , the two are friends and share a mutual respect.[197] Furthermore, indicated that at one point in 2003, Mr. Bakken assured that, recognizing some of the weaknesses in subordinate supervisors, he "would not let anything happen to as long as Mr. Bakken remained at Salem/Hope Creek."[198] In short, no one, including , has provided any reason to believe that Mr. Bakken harbored any ill will because of various positions on the equipment. To the contrary, Mr. Bakken supported

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Similarly, Mr. Levis, the other decision maker responsible for assignment to , had no reason to retaliate. various positions had no substantial effect on Mr. Levis, one way or the other. Rather, Mr. Levis wanted to new leadership in the to address longstanding equipment reliability issues – Moreover, Mr. Levis viewed the assignment as an endorsement of performance – not a repudiation of it. Indeed, Mr. Levis favored the move because it put in position to be the likely successor to the . may not have wanted the job, but his displeasure at the transfer does not make it retaliatory.

B. <u>The Decision to By-Pass the Executive Review Board</u>

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.[199] 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.[200] 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 object" to a proposed personnel action.[201] 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.

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[199] Brothers Interview.
[200] *See* Letter of June 25, 2004.
[201] ERB Charter at 6.

Mr. Brothers, the PSEG senior executive most responsible for the SCWE and the person who brought the ERB to Salem/Hope Creek, indicated that he does not interpret the ERB Charter as providing the ERB with final decision making authority.[202] Consistent with this interpretation, Mr. Bakken understood that, as the CNO, he had the authority to take an action over an ERB "objection."[203] Mr. Cassidy also shared that interpretation.[204]

Given the ERB's role, Mr. Bakken saw little purpose in an ERB review of these personnel actions. Because Mr. Bakken and his successor CNO, Mr. Levis, had the authority to disregard an ERB objection, to Mr. Bakken, it would have been an academic exercise, particularly in light of the unusual circumstances surrounding these personnel actions.[205]

These circumstances give rise to the second reason why the decision makers chose not to obtain ERB review. Specifically, Mr. Cassidy and Mr. Bakken believed that the Operating Contract provided Exelon with sufficient authority to designate the new management team.[206] Mr. Cassidy and Mr. Bakken 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.[207] 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]."[208] They believed that an ERB objection to a proposed action, if allowed to stand, would run counter to the Operating Contract.

Third, Mr. Cassidy and Mr. Bakken believed that significant practical problems precluded the conduct of a meaningful ERB.[209] For example, the two ERB Chairpersons, Mr. Brothers and Mr. Carlin, were both adversely affected by the personnel actions. As noted earlier, PSEG terminated employment and received an assignment with less significant responsibilities. As the was also a and, like , also lost his job in these personnel actions. termination then placed his subordinate, in an awkward position because . In that capacity, 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

[202] Brothers Interview.
[203] Bakken Interview.
[204] Cassidy Interview.
[205] Bakken Interview.
[206] Cassidy Interview; Bakken Interview.
[207] Cassidy Interview; Bakken Interview.
[208] Operating Contract, Section 3.1.1 (emphasis added).
[209] Cassidy Interview; Bakken Interview.

retaliatory and whether, if implemented, the action would result in a chilling effect.[210] Answering these questions about r, would put , and one in which it would be difficult to remain objective. Finally, the HR representative on the ERB, Mr. Labbate, had some, albeit ministerial, role in the terminations. Specifically, Mr. Labbate received information from Mr. Cassidy and Mr. Bakken about the identities of the PSEG managers likely to receive severance. Mr. Labbate also prepared the severance documents and conducted the termination meetings with all but one of the terminated managers.[211]

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 Mr. Cassidy and Mr. Bakken, he asked Mr. Gellrich if a commitment existed. Mr. Gellrich informed Mr. Levis that the use of the ERB was not a regulatory commitment.[212] Mr. Brothers recalls advising Mr. Levis 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."[213] The purpose of this metric was to monitor the performance of management in proposing legitimate adverse actions that were consistent with applicable polices and practices, such that the ERB approved the proposed action without comment or objection.

Like Mr. Levis, Mr. Cassidy did not understand the use of the ERB to be a regulatory commitment.[214] 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.[215] Additionally, Mr. Cassidy consulted with and Mr. E. James Ferland, PSEG Chairman, President, and CEO, before deciding to proceed with the personnel actions.[216]

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

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[210] ERB Charter, Form 3.
[211] Labbate Interview.
[212] Levis Interview. Additionally, Mr. Gellrich recalls hearing Mr. Levis express his opinion that the ERB process did not really fit the circumstances here, where the moves arose out of a merger and reorganization. (Gellrich Interview.)
[213] Letter of June 25, 2004, at 8.
[214] Cassidy Interview.
[215] Cassidy Interview.
[216] Cassidy Interview.

future need for monitoring performance."[217] 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.[218] Mr. Bakken believed that the contractual obligations imposed by the Operating Contact 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 (Messrs. Bakken, Brothers, and Carlin) 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.[219] Even Mr. Brothers, who advocated strongly for the ERB's review of the personnel actions affecting the managers and did not believe that an ERB review of officer actions would be appropriate.[220] And, as Mr. Carlin noted, the officers serve at the pleasure of the Board of Directors, making any ERB action unnecessary and misplaced.[221] Consistent with these views, there is no indication that the ERB has ever reviewed a decision affecting an officer.[222]

An ERB objection to one or more of the decisions affecting PSEG managers was certainly possible and in fact, likely. For example, Mr. Brothers 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 , whose re-assignment was subject to an ERB "objection" in 2004; and (c) the severance of , given his position as .[223] Because the ERB neither convened with unaffected members, nor heard senior management's explanation of the moves, Mr. Brothers' 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,

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

[217] Letter of June 25, 2004, at 8.
[218] Bakken Interview.
[219] Cassidy Interview; Bakken Interview; Carlin Interview.
[220] Brothers Interview.
[221] Carlin Interview.
[222] Brothers Interview; Carlin Interview; Lake Interview.
[223] Brothers Interview.

well before the executives received feedback on this issue from Mr. Brothers. In fact, Mr. Labbate recalled that Mr. Cassidy told Mr. Labbate 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.[224] 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.

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

[224] Labbate Interview.

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 pre-requisite 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."[225] 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.[226] The absence of clear communications caused at least two managers, , 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 Contact 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

[225] ERB Charter, Purpose, para. 2.
[226] As discussed in the Findings, however, the three adversely affected officers received an explanation on December 18, 2004.

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."[227] Thus, the Operating Contact 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."[228]

Additionally, the effective date of the Operating Contract, January 17, 2005,[229] 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 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.[230] 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.

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[227] Operating Contract, Section 3.1.1 (emphasis added).
[228] Operating Contract, Section 4.1.1 (emphasis added).
[229] Operating Contract, Article 2.
[230] ERB Charter, Purpose, para. 3.

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 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.[231]

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.[232] 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

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

[232] NRC Allegations By Calendar Year Received January 2001 – January 2005 (Exhibit 28).

nuclear safety concerns.[233] He believes, however, that the workforce is proceeding cautiously at this point, given their lack of understanding of the reasons for the personnel actions and the selection of the for termination.[234]

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.[235] In fact, many interviewees dismissed the notion that the workforce would hesitate to raise such an issue, noting that the workers are well aware of their rights and are not bashful in exercising those rights.[236]

Although the evidence is clear that the personnel actions have not altered the workforce's willingness to use this vital safety valve for nuclear safety concerns, the evidence is equally clear that the actions have led some employees and managers to seek a low, or lower, profile than before the actions.[237] Of course, a merger will always create a certain amount of uncertainty and apprehension in the workforce.[238] Workers fear that a merger will spawn workforce reductions. The Salem/Hope Creek workforce is no different and these concerns are palpable.[239] Several interviewees noted that the workforce is now waiting for the "next shoe to drop," knowing that a reorganization lies ahead.[240] The January 2005 personnel actions fed that fear, but the level of apprehension has not risen to the level that it would affect the willingness of the workforce to raise nuclear safety concerns.[241]

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236 *See, e.g.*, Levis Interview (Workers have not been "bashful" raising issues with the new CNO. One called Mr. Levis at home to raise a concern about dead geese on-site);

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239 Mr. Brothers described the actions as having caused the workforce to exclaim, "wow," which has put the workforce "back on their heels." (Brothers Interview.)

240 *See, e.g.*, Merger Questions & Answers, Feb. 22, 2005 (Exhibit 29);

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Many interviewees noted that the absence of communications about the selections and the selection process has led to speculation about the reasons for the actions.[242] In one instance, the interviewee observed that the absence of information is not only confusing, but it has also precluded him from understanding and meeting the expectations of the new organization because he does not believe he knows the new standards.[243] 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.[244]

More importantly, some questioned whether the moves signaled a diminished emphasis on the work environment.[245] 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 the an area of heightened regulatory scrutiny, some interviewees did not know how to interpret [246] Except for those with whom Mr. Bakken had shared his concerns about performance, the interviewees were at a loss to explain his severance. That loss, combined with the termination of , and the reassignment of , 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."[247] Not knowing what happened to cause so many visible managers to be either terminated or replaced has been difficult for some people.[248] 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.[249] But there is no evidence to indicate that the personnel actions have caused workers to hesitate to raise a nuclear safety concern.

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[247] Levis Interview.

[248] *See, e.g.*, Levis Interview;

[249] Mr. Brothers indicated that "people have learned to say 'yes'," rather than challenge a position. Brothers Interview;.