

**NRC COZINESS WITH INDUSTRY**

**Nuclear Regulatory Commission Fails to Maintain  
Arms Length Relationship with the Nuclear Industry**

**An Investigative Report**

**Subcommittee on General Oversight and Investigations**

**Committee on Interior and Insular Affairs**

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NUCLEAR REGULATORY COMMISSION  
FAILS TO MAINTAIN ARMS LENGTH  
RELATIONSHIP WITH NUCLEAR INDUSTRY

I. INTRODUCTION

The Nuclear Regulatory Commission is charged with regulating commercial nuclear power in the United States.<sup>1</sup> Unlike its predecessor, the Atomic Energy Commission, the NRC is not intended to promote the development of nuclear power.<sup>2</sup> The role of the NRC is to protect public health and safety as it relates to nuclear energy.<sup>3</sup>

Nuclear power is an important energy resource in this country. The future success of nuclear power depends on the safe operation of nuclear power plants and on the American people having confidence in the nuclear industry and in those who regulate it. This confidence can only be instilled by vigorous regulation of nuclear energy.

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<sup>1</sup>. Atomic Energy Act of 1954, 42 U.S.C., Section 2011 et seq.; Energy Reorganization Act of 1974, 42 U.S.C., Section 5801 et seq.

<sup>2</sup>. Ibid.

<sup>3</sup>. Ibid.

Many who support relaxed regulation of the nuclear industry do so out of a sincere desire to see the industry succeed. This view is extremely shortsighted. In the near term, relaxing safety regulation may slightly reduce nuclear utility operating costs; however, in the long run, lax regulation could lead to an accident which could have disastrous consequences for the American people and for the future of the American nuclear power industry.

Nowhere is there a greater need for close scrutiny by regulators and investigators than in the nuclear industry. Close scrutiny is needed because so much is at stake. Also, due to the inherent danger of nuclear power plants, there is little margin for error. Nuclear power is not a forgiving technology. It is a technology both delicate and potentially devastating, which can affect the health, welfare and indeed the lives of millions of people.

Many in the nuclear industry have done an admirable job of making sure that their nuclear plants are built and operated safely. However, regulation is not geared to those in any industry who would take precautionary measures even if it were not legally required. Regulation is addressed to those who would not take such steps on their own. (A report performed under the auspices of the nuclear industry, in fact, recommended that those nuclear plants that achieve operational excellence and those

whose performance is lacking should both be identified by name in a periodic accounting by the industry.)<sup>4</sup>

Beginning in April, 1987, the Subcommittee on General Oversight and Investigations conducted a six-month investigation of the relationship between the NRC and the commercial nuclear industry. The Subcommittee held two hearings, the first on June 11, 1987, and the second on October 14, 1987, both in Washington, D.C.

On the basis of the Subcommittee's investigation, we have reached several conclusions: First, the Nuclear Regulatory Commission has not maintained an arms length regulatory posture with the commercial nuclear power industry. Second, the NRC has, in some critical areas, abdicated its role as regulator altogether. Third, the NRC has tried to stifle its Office of Investigations (OI) from performing independent investigations of wrongdoing by licensees.

## II. SUBCOMMITTEE INVESTIGATION

In the course of its inquiry, the Subcommittee collected extensive documentary evidence from the NRC and conducted numerous interviews of NRC personnel and of others from outside the Commission.

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<sup>4</sup>. Report of Task Committee of Utility Nuclear Power Oversight Committee (UNPOC), Sillin, et al., "Leadership in Achieving Operational Excellence," p.16 (1986).

On June 11, 1987, the Subcommittee held a hearing at which the following witnesses appeared:

U.S. Nuclear Regulatory Commission

Chairman Lando W. Zech, Jr.

Commissioner James K. Asselstine

Commissioner Frederick M. Bernthal

Commissioner Kenneth M. Carr

Commissioner Thomas M. Roberts

Loren L. Bush, Jr., Chief, Program Development and Review Section, Safeguards Branch, Division of Reactor Inspection and Safeguards, Office of Nuclear Reactor Regulation, NRC

James A.F. Kelly, Senior Security Inspector for NRC, Region IV

Eugene T. Pawlik, Director, Office of Investigations, Region III, NRC

John R. Sinclair, Operations Officer, Office of Investigations, NRC

On October 14, 1987, the Subcommittee held a hearing at which the following witnesses appeared:

Ellyn Weiss, Esq., General Counsel, Union of Concerned Scientists

U.S. Nuclear Regulatory Commission

Chairman Lando W. Zech, Jr.

Commissioner Frederick M. Bernthal

Commissioner Thomas M. Roberts

Commissioner Kenneth Rogers

Dr. Victor Gilinsky, Former Commissioner, U.S. Nuclear  
Regulatory Commission

Barton Z. Cowan, Esq., representing American Nuclear Energy  
Council (ANEC) and Nuclear Management and Resources  
Council (NUMARC)

Based on the investigation and hearings, the Subcommittee identified five significant instances in which the NRC failed to maintain a proper regulatory relationship with the nuclear industry:

1. With respect to the prevention of drug and alcohol abuse at nuclear power plants (fitness for duty), the NRC relented to industry pressure and issued an unenforceable policy statement rather than a binding regulation.
2. With respect to fire protection at nuclear plants, the NRC held meetings behind closed doors with a number of utilities and complied with the desires of the industry by issuing an interpretation that took the teeth out of a previously issued fire protection regulation.
3. Commissioner Thomas M. Roberts engaged in behavior that constitutes malfeasance and reflects a continuing closeness with the nuclear industry.

4. NRC staff interfered with and undermined an investigation of licensee wrongdoing at the Fermi 2 plant in Michigan, conducted by NRC's Office of Investigations.
5. Despite the lack of an adequate administrative record demonstrating a problem in need of a solution, the Commission issued a rule severely restricting the ability of its own staff to require safety improvements (backfits) at existing nuclear plants.

### III. FACTUAL ANALYSIS

#### A. FITNESS FOR DUTY

In March of 1982, the NRC became aware of drug and alcohol problems among those who operate nuclear power plants.<sup>5</sup> The NRC staff identified "an alarming increase in reported drug-related incidents," a "wide range of personnel implicated" and "a pervasiveness of the reports on a national basis."<sup>6</sup> In response to this report, the NRC issued proposed rulemaking just five months later.<sup>7</sup> In July, 1984, the Commission approved publication of a final rule that would have required licensees to

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<sup>5</sup>. NRC IE Information Notice No. 82-05.

<sup>6</sup>. Ibid.

<sup>7</sup>. 47 FR 33980, (August 5, 1982).

establish and implement procedures designed to provide reasonable assurance that personnel with unescorted access at power reactors are not under the influence of drugs or alcohol.<sup>8</sup> However, the Commission's approval of the final rule was made subject to the willingness of the two major industry groups to develop detailed program elements and acceptance criteria in lieu of NRC prescriptive guidance.<sup>9</sup>

It was the industry position that any rulemaking or other form of mandatory requirement undermines the voluntary efforts of the industry toward self-improvement. One of the industry groups, the Nuclear Utility Management and Resources Committee (NUMARC), conditioned its cooperation in issuing the detailed guidance of a fitness for duty program on the NRC's not promulgating a Fitness for Duty rule.<sup>10</sup> In the NRC's own words, "They want the NRC to promulgate a Policy Statement or Generic Letter regarding fitness for duty which would not establish enforceable requirements."<sup>11</sup>

Loren Bush, NRC's staff contact on fitness for duty, provided the Subcommittee with his perspective on the industry position:

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<sup>8</sup>. Staff Requirements - Affirmation/Discussion and Vote, 7/9/84.

<sup>9</sup>. Ibid.

<sup>10</sup>. Memorandum of 9/4/84 from Executive Director for Operations to Commissioners.

<sup>11</sup>. Ibid.

"I regarded this as dictatorial and an attempt to intimidate the NRC, to gain the upper hand. My reaction was, 'Who the hell is regulating who?'"<sup>12</sup>

Nevertheless, in October of 1984, in response to the industry reaction, the Commission directed the staff to withhold action on the rule and to prepare a policy statement in coordination with the industry.<sup>13</sup>

NRC's staff prepared a policy statement and, at the direction of the Executive Director for Operations (EDO), met with the industry groups to ensure that industry clearly understood and was able to accomplish the program.<sup>14</sup> This policy statement reflected the wishes of the industry. Subsequent to this meeting, the Commission diluted the requirements of the policy statement, and in July of 1986 approved its publication, and the withdrawal of the previously approved rule.<sup>15</sup> The policy statement was published in the Federal Register on August 4, 1986.<sup>16</sup>

By issuance of the policy statement rather than a rule, the NRC has left it to the industry to regulate itself in the area of drug and alcohol abuse. The policy statement is only an expression of concern on the part of the NRC. It mandates

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<sup>12</sup>. Prepared Testimony of Loren Bush before Subcommittee on General Oversight and Investigations, June 11, 1987.

<sup>13</sup>. Staff Requirements Memorandum, 10/24/84.

<sup>14</sup>. Prepared Testimony of Loren Bush before Subcommittee on General Oversight and Investigations, June 11, 1987.

<sup>15</sup>. Staff Requirements Memorandum, 7/7/86.

<sup>16</sup>. 51 FR 27921, (August 4, 1986).

nothing. It does not require that the industry comply with any standards or take any action regarding drug and alcohol abuse. It does not even require the utilities to comply with the industry guidance on drug and alcohol abuse.<sup>17</sup>

By virtue of the policy statement, the utilities are not required to prohibit anyone who is drunk or on drugs from being permitted access to the vital areas of the plants nor are they required to have a program to ensure that one who is under the influence of drugs or alcohol does not gain access to vital areas of the plant. The policy statement is not enforceable.<sup>18</sup>

Unless there is an immediate threat to health or safety, the NRC may take no regulatory action against a utility for failing to prevent drug and alcohol abuse. That is, until something goes wrong which creates an immediate threat, the NRC can take no regulatory action against a utility that has not set up a reasonable program to prevent against future safety problems resulting from drug and alcohol abuse. Therefore, even if the NRC discovers a series of problems with drug and alcohol abuse at a plant, unless it is aware of a person under the influence of drugs or alcohol at a particular time, it is unlikely to be able to take enforcement action against the utility.<sup>19</sup> Also, the

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<sup>17</sup>. Ibid.

<sup>18</sup>. Ibid.

<sup>19</sup>. Prepared Testimony of Loren Bush before Subcommittee on General Oversight and Investigations, June 11, 1987.

policy statement is too vague to explain what the Commission deems to be an adequate fitness for duty program.

Not only does the policy statement require no action on the part of the utilities, but the industry's own guidelines are optional, not mandatory. The utilities can pick and choose which ones they want to comply with.<sup>20</sup>

NRC official Loren Bush explained the bottom line of the NRC approach:

"As a result, the NRC has essentially left it to the nuclear industry to regulate itself. For its part, the industry developed voluntary guidelines but has prescribed no standards for the prevention of drug and alcohol abuse. Thus, there is no law, no regulation, no national or industry standard, which requires nuclear power plants to protect against drug and alcohol abuse."<sup>21</sup>

This abdication by the NRC of its responsibilities has not been without adverse consequences.

As an NRC inspector with extensive experience testified:

"My observations are that the industry usually does not seek to identify these kinds of problems, often fails to investigate those problems brought to its attention, often fails to report such problems to the NRC, and does not always cooperate with the NRC when the NRC occasionally decides to investigate. The NRC, for its part, has rarely investigated allegations of drug and alcohol problems. My experience reflects that for the most part, the utilities have demonstrated their unwillingness or inability to pursue the allegations."<sup>22</sup>

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<sup>20</sup>. Ibid.

<sup>21</sup>. Ibid.

<sup>22</sup>. Prepared Testimony of James A.F. Kelly before Subcommittee on General Oversight and Investigations, June 11, 1987.

There have been numerous incidents of employees of nuclear power plants under the influence of drugs or alcohol at plant sites. In December of 1986, the NRC acknowledged that there had been at least one incident of drug or alcohol abuse at no fewer than 61 of this country's nuclear plants (about 3 out of every 5 plants) in the previous five years.<sup>23</sup> Moreover, even when it is confronted with reports of drug and alcohol problems, the NRC chooses to refer such reports to the utilities rather than pursuing them itself.

At the June 11th hearing, NRC inspector Kelly described the manner in which two separate sets of incidents of drug and alcohol abuse were handled at two separate plants. The similarities between the two cases are frightening.

At the Cooper Nuclear Station in Nebraska, there were a number of incidents of drug and alcohol abuse discovered by the NRC in a random inspection during a limited two-month time frame. The NRC referred the matter to the utility, turning over all of its investigative leads. There was evidence of smoking of marijuana by two security officials in the owner-controlled area, a security guard unconscious, drunk or drugged in the security ready room, a licensed operator reporting to work drunk, and the smoking of marijuana inside the protected area of the plant as well as inside the diesel generator room which contains vital equipment.<sup>24</sup>

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<sup>23</sup>. Letter of December 9, 1986 from Chairman Zech.

<sup>24</sup>. Testimony of James A.F. Kelly, June 11, 1987.

NRC inspectors also uncovered drug and alcohol problems at the Fort St. Vrain plant in Colorado. At both the Cooper plant and at Fort St. Vrain, the NRC instructed its inspectors to turn their work product over to the utilities. In neither case did the NRC take any regulatory action. In neither case did anything come of the utilities' follow-up investigation. In both cases, the individuals to whom the utilities had assigned responsibility for investigating were, within a year and a half, in legal trouble themselves. One was arrested for possession of drugs, and two others were indicted for taking kickbacks.<sup>25</sup>

Based on these case examples, and moreover on Mr. Kelly's experience as a veteran NRC investigator, it was his opinion that these incidents may well represent just the tip of the iceberg of drug and alcohol abuse at nuclear power plants.<sup>26</sup>

In spite of the prevalence of the problem,

" . . . few if any of the utilities have comprehensive programs to deal effectively with drug and alcohol abuse. For the most part, they are not capable of self-policing, nor do they report problems to the NRC. The NRC typically chooses not to pursue these matters even referring problems to utilities that have demonstrated their unreliability."<sup>27</sup>

Subsequent to the June 11th hearing, every member of the Subcommittee signed a letter to the NRC urging adoption of an enforceable fitness for duty rule.<sup>28</sup> Notwithstanding the

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<sup>25</sup>. Ibid.

<sup>26</sup>. Ibid.

<sup>27</sup>. Ibid.

<sup>28</sup>. Letter of July 13, 1987.

testimony at the hearing, its own earlier recognition of the pervasiveness of drug and alcohol abuse in the industry, and its own statistics, the NRC rejected the Subcommittee suggestion that prompt action was appropriate. The NRC preferred to wait until 1988 when the 18-month trial period for the policy statement expires to even consider issuing an enforceable regulation.<sup>29</sup>

#### B. FIRE PROTECTION

In 1975, there was a nearly disastrous fire at the Browns Ferry nuclear power plant, which disabled essential safety systems. As a result of that fire, the NRC issued proposed, and then final (Part 50, Appendix R), fire protection regulations.<sup>30</sup> The purpose of the rule was to ensure that plants are shut down safely in the event of a fire. Many in the nuclear industry considered these regulations to be unnecessarily burdensome, and a number of utilities brought suit challenging their promulgation. The NRC prevailed in court, and the rule was upheld both substantively and procedurally (Connecticut Light and Power Company et al. v. NRC, 673 F.2d 525 (D.C. Cir. 1982)).

Having failed through the courts to compel the NRC to withdraw the rule, industry representatives asked for the NRC's

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<sup>29</sup>. Letter of August 14, 1987 from NRC Chairman Lando W. Zech, Jr. to Chairman Sam Gejdenson. In a Commission briefing of December 1, 1987, Chairman Zech apparently reversed his earlier statement and supported a fitness for duty rule. The Subcommittee applauds Chairman Zech's position and urges that he take the lead in seeing that the NRC issue a rule without further delay.

<sup>30</sup>. 45 FR 36082 (May 29, 1980).

help in reducing the 'burdensomeness' of the rule.<sup>31</sup> They bypassed the technical experts, the fire protection engineers, and jumped the chain of command up to staff management.<sup>32</sup>

The utilities first met with the Deputy Division Director in charge of fire protection. The utilities informed him that if they didn't get a satisfactory solution from him they would immediately visit Mr. Victor Stello, who was then Deputy Executive Director for Operations. That same day they visited Mr. Stello who essentially instructed a staff attorney to prepare an interpretation document that would satisfy the utilities.<sup>33</sup> These meetings between Mr. Stello and the utilities were not public.<sup>34</sup> In fact, the NRC's own fire protection engineers were excluded from these meetings at which interpretations of fire protection standards were being developed.<sup>35</sup>

The fire protection rule had been subjected to an open administrative process of notifying the public of proposed rulemaking and providing an opportunity to comment on the proposal before issuing a final rule. Regardless of the process involved in developing the rule, the 'interpretation' was created behind closed doors. The meeting between the NRC and utility

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<sup>31</sup>. Testimony of Commissioner James K. Asselstine before Subcommittee on General Oversight and Investigations, June 11, 1987 (p. 119 of unrevised transcript).

<sup>32</sup>. Ibid.

<sup>33</sup>. Ibid.

<sup>34</sup>. Ibid., p. 130.

<sup>35</sup>. Ibid.

officials was not made public; there was no notice of the meeting, and no other interested parties were invited.<sup>36</sup>

The upshot of this meeting was an "interpretation" of the rule, issued in 1985, that granted the industry the relief it had sought. By virtue of the "interpretation," each utility was permitted to come up with its own modifications and interpretations of the NRC's fire protection standards without coming to the NRC for approval.<sup>37</sup> Based on their own analyses, the utilities would modify NRC's standards without so much as consulting with the NRC. Unless the NRC later discovers through an inspection what fire standards the utility had applied, the Commission might never know.<sup>38</sup>

In contrast, under the NRC rule, the utilities would have had to demonstrate to the NRC's satisfaction that a particular interpretation or approach to fire protection was appropriate. Under this formal exemption process, there would have been a dialogue between the NRC's staff and the utility, after which the NRC would have made an administrative determination on the adequacy of the utility's proposal to protect against fire at its nuclear power plant.<sup>39</sup>

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<sup>36</sup>. Ibid.

<sup>37</sup>. Ibid., pp. 135-6, 150.

<sup>38</sup>. Ibid., pp. 135, 150.

<sup>39</sup>. Ibid., pp. 134-35.

Also of note is a memorandum of May 29, 1984, from Mr. Sheldon Trubatch, an attorney in NRC's Office of General Counsel, identifying problems with the interpretation. Mr. Trubatch was the NRC attorney who successfully defended the lawsuit challenging the fire protection regulation. He expresses concern that the "interpretation" represents such a fundamental change in the rule as to be a modification of the rule, and therefore should go through notice and comment rulemaking. (There is a memorandum of October 24, 1985, from NRC's Office of General Counsel presenting the opposite point of view). Mr. Trubatch concludes that

"Therefore, to now interpret Appendix R so as to not incorporate a fundamental lesson learned at Browns Ferry would appear to directly contradict the Commission's intent in promulgating Appendix R."<sup>40</sup>

The interpretation was nevertheless issued without being offered for public notice and comment.

The NRC's fire protection engineers and inspectors objected to the role reversal that put the burden on the staff to discover problems with a utility's deviations from NRC standards, rather than placing the burden on the utility to justify such deviations up front to the NRC staff. They also felt that the interpretation made it impossible for them to do their jobs: before making a physical inspection of a plant to determine compliance, they needed to see a detailed analysis of the plant

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<sup>40</sup>. Memorandum of May 29, 1984.

and a justification for the exemption.<sup>41</sup> Under the interpretation, they would receive neither.

Another concern of the NRC fire protection engineers was that under the rule there would have been a technical review before changes were made to the plant. Pursuant to the interpretation, physical changes are made to the plant before the NRC has an opportunity to perform a review.<sup>42</sup>

At the June 11th hearing, Commissioner Asselstine, who had debriefed most, if not all, of the key participants involved in the process of issuing the interpretation, summed up the course of events:

". . . however you come out on the merits of the changes that were ultimately approved by the Commission, whether you agree or disagree with them, one has to conclude that this process was wrong.

"The fact is that the people who were responsible for this area of our activities weren't even consulted. They didn't even get their chance to make their case to Mr. Stello. Instead, the industry came trotting in. After they hadn't been able to persuade the staff, they go straight to Mr. Stello; he accommodates them and he didn't even give the fire protection engineers a chance to say here is what is wrong with what they are asking for; here is why it hurts our ability to do our job.

"And from that point forward, what those guys were told was, whatever your concerns are, you have to understand that it was a management decision by the agency and that was essentially the answer that was given to them throughout the process.

"We had eight fire protection engineers in this agency at the time. Five of those eight people felt so strongly about what had been done that they filed differing professional opinions, and that is not something in this agency that is

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<sup>41</sup>. Asselstine, p. 135-6.

<sup>42</sup>. Ibid., pp. 137-8.

done lightly. It is also not something that necessarily does your long-term career with the agency any great good.

"Those people stuck their necks out and they said we feel so strongly about this that we are filing differing professional opinions. I think however you come out on the merits, whether they were right or whether the industry was right, you have to acknowledge that this was the wrong process and it certainly was not an arms length dealing with the industry."<sup>43</sup>

### C. MALFEASANCE BY COMMISSIONER THOMAS M. ROBERTS

Failure to maintain an arms length regulatory relationship with the nuclear industry is a serious problem when it involves the NRC as an institution. It is also of great concern when it involves high ranking NRC officials, such as individual commissioners. The actions of Commissioner Thomas M. Roberts have raised such concerns.

On at least three separate occasions, the actions of Commissioner Roberts reflected a close relationship with the industry that he was supposed to be regulating. Commissioner Roberts' behavior reflects more than poor judgment. It demonstrates a disdain for the process of government and constitutes malfeasance in his role as Commissioner.

In 1983, important NRC documents relating to quality assurance problems at the Waterford plant in Louisiana were apparently leaked from Commissioner Roberts' office to the owner of the utility, Mid-South Utilities. The initials "TR" appeared

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<sup>43</sup>. Ibid., pp. 150-1.

in the upper right hand corner of the leaked document.<sup>44</sup> Prior to coming to the Nuclear Regulatory Commission, Mr. Roberts had been president of Southern Boiler and Tank Works which sold several millions of dollars of equipment to utilities owned by Mid-South.<sup>45</sup> Commissioner Roberts denies leaking this information himself or having someone else in his office leak the information.<sup>46</sup>

In 1985 when the leak was discovered by NRC's Office of Investigations, Commissioner Roberts terminated the internal NRC investigation into the leak. Commissioner Roberts did not refer the matter to the Office of Inspector and Auditor, the NRC office responsible for investigating wrongdoing by NRC employees. Rather Commissioner Roberts simply asked his staff if they knew the source of the leak and then terminated the investigation by collecting all documentary evidence in their possession relating to the leak.<sup>47</sup> On April 9, 1987, Commissioner Roberts testified under oath before the Senate Governmental Affairs Committee that

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<sup>44</sup>. Memorandum of June 8, 1983 from James K. Joosten to Richard C. DeYoung.

<sup>45</sup>. Testimony of Commissioner Thomas M. Roberts before Subcommittee on General Oversight and Investigations, June 11, 1987, (pp. 82-85 of unrevised transcript).

<sup>46</sup>. Ibid., p. 87.

<sup>47</sup>. Sen. Rep. No. 100-150, Senate Committee on Governmental Affairs, p. 65.

he had destroyed all such documents. He later corrected his testimony asserting that he had found some of the documents.<sup>48</sup>

Therefore, not only did Mr. Roberts fail to properly refer this matter to the appropriate NRC investigators, he took steps to destroy evidence of a leak to a licensee, and presented false testimony to the Congress regarding such destruction of evidence.

The Subcommittee on General Oversight and Investigations uncovered two other significant incidents in which Mr. Roberts demonstrated a serious lack of judgment and a failure to respect the process of government.

In one instance, Mr. Roberts attempted to interfere with an investigation by the Office of Government Ethics. In another, he ignored the request of a United States Attorney and the repeated reminders of NRC's Solicitor regarding meetings with defense counsel in a criminal case brought on the basis of false statements made to the NRC.

In 1986, Mr. Roberts attempted to interfere with an ongoing investigation conducted by the Office of Government Ethics (OGE) into conflict of interest charges against Steven White, director of the Tennessee Valley Authority's (TVA) nuclear power program. Mr. Roberts visited Mr. David Martin, director of OGE, to get

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<sup>48</sup>. Letter of April 28, 1987, from Commissioner Roberts to Senator Glenn.

some definitive answers regarding the charges, and as he put it, "straighten things out."<sup>49</sup>

At the time he visited Mr. Martin of OGE, Mr. Roberts was under consideration for nomination to the TVA Board of Directors. In testimony before the Post Office and Civil Service Investigations Subcommittee, Mr. Martin stated that "He [Roberts] called me because he was a prospective nominee to the TVA Board of Directors and asked me what in fact was going on down there...."<sup>50</sup> Roberts also called Martin two days after Martin's testimony to say that he (Roberts) didn't appreciate the way Martin had described their conversation in his testimony.<sup>51</sup>

During the course of his meeting with Martin, Mr. Roberts:

- o continued to pursue the conversation even after Martin had said that "there is something to look into" in the conflict of interest charges;
- o challenged OGE's jurisdiction over TVA;
- o stressed the importance of getting TVA's nuclear program turned around; and
- o "panted on him pretty hard," saying that the TVA problem was a \$12-\$15 billion problem.<sup>52</sup>

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<sup>49</sup>. Memorandum to file from Courtney. Courtney is Courtney Ward of the House Post Office and Civil Service Investigations Subcommittee, who along with a colleague, interviewed Mr. Roberts. This memorandum is the product of the notes taken by the two investigators.

<sup>50</sup>. Transcript of Hearing, September 29 and 30, 1986, p. 91.

<sup>51</sup>. Memorandum to file from Courtney. See Footnote 49 above.

<sup>52</sup>. Ibid.

Thus, Roberts went to OGE as an advocate for TVA, an organization that he might soon join, and one that he, as a Commissioner of NRC, was then regulating. Mr. Roberts' actions reflect a clear conflict of interest on his part.

Mr. Roberts again displayed his lack of respect for the seriousness of government in the context of a criminal case brought against the utility that operates the D.C. Cook nuclear power plant. The Department of Justice brought this case which had been developed by the NRC based on alleged violations of NRC's statute and regulations and alleged material false statements made by the utility to the NRC.

It was contemplated that, as part of the criminal prosecution, the Commissioners would appear before the grand jury. The United States Attorney, Mr. John Smietanka, requested that the Commissioners inform him of meetings with defense counsel so that he (the U.S. Attorney) would be given the opportunity to be present. Despite repeated reminders from NRC's Solicitor, Mr. Roberts chose to ignore this request.

On September 4, 1985, Mr. Gerald Charnoff, attorney for the defendant, D.C. Cook, contacted Mr. Roberts to meet with him that same day.<sup>53</sup> Mr. Roberts' assistant (Mr. J.M. Cutchin) visited with NRC Solicitor Briggs, who again advised Mr. Cutchin of the U.S. Attorney's request that the Commissioners not talk with

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<sup>53</sup>. Memorandum to File from J.M. Cutchin re meeting with Gerald Charnoff (9/10/85).

defense counsel without the prosecution present.<sup>54</sup> Mr. Cutchin said that Mr. Roberts had a 4:00 p.m. meeting scheduled with defense counsel. The Solicitor offered to call the U.S. Attorney, but Mr. Cutchin declined, saying that he would relay the Solicitor's message to Mr. Roberts.<sup>55</sup> The U.S. Attorney was not called.<sup>56</sup>

Nevertheless, the meeting between Mr. Roberts and defense counsel took place that day. Defense counsel began by explaining that his purpose in asking for the meeting was to discuss with Commissioner Roberts the meeting Roberts had had with the U.S. Attorney regarding Roberts' prospective testimony before the grand jury. Even after Mr. Roberts was informed of the purpose of the meeting, he allowed the meeting to continue and was perfectly willing to discuss his earlier conversation with the U.S. Attorney. At that point, Cutchin advised defense counsel Charnoff of the U.S. Attorney's request.<sup>57</sup> There is no mention in the recorded memorandum of any attempt by Mr. Roberts even to call the U.S. Attorney. Mr. Cutchin simply noted that the U.S. Attorney's attendance was obviously not possible on such short notice.<sup>58</sup> It is not clear why the meeting was so urgent that it

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<sup>54</sup>. Handwritten Memorandum to File from NRC Solicitor Briggs, (9/4/85).

<sup>55</sup>. Ibid.

<sup>56</sup>. Memorandum to File from J.M. Cutchin re meeting with Gerald Charnoff (9/10/85).

<sup>57</sup>. Ibid.

<sup>58</sup>. Ibid.

had to take place the same day that Mr. Charnoff requested it.<sup>59</sup> The grand jury was not going to convene for at least another month.<sup>60</sup>

Mr. Cutchin also stated at the meeting that he would make notes from which he would prepare minutes to be made available to the U.S. Attorney. However, in the last sentence of Mr. Cutchin's memorandum it states "Most of the discussion centered around what had been said by Commissioner Roberts during his meeting with the U.S. Attorney."<sup>61</sup> There is nothing else in the memorandum that describes what Mr. Roberts discussed with defense counsel regarding his meeting with the U.S. Attorney, despite the fact that it comprised "most of the discussion" at Mr. Roberts' meeting with defense counsel.<sup>62</sup> Nothing more was sent to the U.S. Attorney by the NRC.<sup>63</sup> Is this one sentence on what turned out to be the bulk of the meeting to be considered the "minutes" of that meeting?

Mr. Roberts was apparently more concerned with satisfying the desires of counsel for the defense than with cooperating with the U.S. Attorney. He agreed to meet with counsel for the defense on the same day that the meeting was requested. For the

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<sup>59</sup>. Ibid.

<sup>60</sup>. Memorandum to File from NRC Solicitor Briggs, (9/17/85).

<sup>61</sup>. Memorandum of 9/10/85 from Cutchin to File.

<sup>62</sup>. Ibid.

<sup>63</sup>. Letter of May 26, 1987 from U.S. Attorney Smietanka to Chairman Sam Gejdenson.

better part of 90 minutes, he was happy to discuss with defense counsel his earlier conversation with the U.S. Attorney. Yet, Roberts was unwilling to honor the simple request of the government's lawyer that he be given the opportunity to be present at meetings with counsel for the defense. Nor was Mr. Roberts sufficiently concerned with the needs of the U.S. Attorney to provide him with more than a one-sentence description of what had transpired with defense counsel for most of 90 minutes. It is of note that Mr. Roberts opposed taking criminal action against D.C. Cook and was therefore not in favor of the U.S. Attorney's prosecution of the case.<sup>64</sup>

The U.S. Attorney's request was neither unreasonable nor onerous. He was bringing a case based on facts developed by the NRC and alleging violations of NRC's statute and regulations. If the leadership of the NRC was going to meet with defense counsel, the U.S. Attorney simply sought the courtesy of being made aware of what the government officials were saying to the defense. NRC's Solicitor had perceived the request to be of sufficient importance to remind Mr. Roberts' office of it on at least two occasions. Since the focus of defense counsel's interest was the conversation that had taken place between Roberts and the U.S. Attorney, the request is even more understandable. Further, it would have been easy for Roberts to honor the request. But he

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<sup>64</sup>. Memorandum of March 26, 1984 from Commissioner Roberts to Chairman Palladino; Dissenting Views of Commissioner Roberts on D.C. Cook (4/26/84); Unrevised Transcript of June 11, Hearing of Subcommittee on General Oversight and Investigations, pp. 112-113.

would not favor the government's lawyer with the simple courtesy that had been requested.

Commissioner Roberts' failure to respect the wishes of the U.S. Attorney is reflective of the same disdain for the governmental process that he displayed in his destruction of evidence of leaked information, and his attempted meddling in the investigation conducted by the Office of Government Ethics. At the June 11th hearing, even when Mr. Roberts was confronted with the evidence of the meeting with defense counsel, he continued to insist that neither the meeting nor the discussion at the meeting was improper. He also testified that he was aware of no facts that would refute the information contained in the relevant documents.<sup>65</sup>

These three separate incidents represent a pattern of coziness with the nuclear industry on the part of one commissioner. It is the Subcommittee's position that they also represent malfeasance sufficient to justify removal of Commissioner Roberts by the President. On June 17, 1987, Subcommittee Chairman Sam Gejdenson asked the President to remove Mr. Roberts. On June 26, 1987, the White House acknowledged Chairman Gejdenson's request but has never made a substantive response, either to grant or deny the request.

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<sup>65</sup>. Unrevised Transcript of Hearing of Subcommittee on General Oversight and Investigations, June 11, 1987, pp. 110-112. Also see Letter of June 19, 1987, from Commissioner Roberts to Chairman Gejdenson, and Letter of June 24, 1987, from Chairman Gejdenson to the President.

**D. NRC STAFF UNDERMINED INVESTIGATION OF LICENSEE WRONGDOING**

The NRC's Office of Investigations (OI) is responsible for conducting independent investigations of licensee wrongdoing, and for referring, as warranted, such investigations to the Department of Justice for criminal prosecution.

The Office of Investigations found that a nuclear reactor, Fermi 2 in Michigan, had gone prematurely critical (had started up unintentionally) and that the utility knowingly withheld this information from the NRC;<sup>66</sup> this is a potential violation of the Atomic Energy Act which could be the basis of a civil enforcement action by the NRC or a criminal prosecution by the Department of Justice. Despite an OI report documenting the utility's actions, the NRC would not determine that there had been a material false statement on the part of the utility. Rather than using the OI report as a basis for regulatory action, the NRC staff chose to try to discredit the report by issuing its own analysis.<sup>67</sup>

The staff document ignored compelling evidence. The utility knew of the fact that the reactor had gone prematurely critical, but despite the presence of NRC personnel at the plant site, did not inform the NRC for over a week after the occurrence. The

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<sup>66</sup>. Office of Investigations, February 14, 1986, Report of Investigation, Enrico Fermi 2, Material False Statement.

<sup>67</sup>. Memorandum of March 11, 1986 from Office of Executive Legal Director to Acting Executive Director for Operations.

utility itself was treating this information as highly significant, with calls to supervisors after midnight, weekend meetings, and studies and re-studies of the problem. The utility sat through the Commission licensing meeting without mentioning a word of the premature criticality, even though it knew that the NRC was unaware of it. The NRC official who signed the license said that had he known of the premature criticality, he would not have issued the license. The NRC was not informed of the premature criticality until the day the utility had the license in hand.<sup>68</sup>

Yet, the NRC staff, before it had seen the final report, was preparing its own response to what it understood to be the OI finding.<sup>69</sup>

The NRC staff opinion found that despite all the evidence to the contrary, including the perceptions of the utility and NRC personnel, the fact that this plant went prematurely critical was not material to the licensing process.<sup>70</sup> Despite the evidence, the staff's instinct was to act as an advocate for the utility, implicate NRC employees for their roles in the situation, and issue an opinion the effect of which would make it problematic

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<sup>68</sup>. OI Report of 2/14/86. Prepared Testimony of Eugene T. Pawlik Before Subcommittee on General Oversight and Investigations, June 11, 1987.

<sup>69</sup>. Prepared Testimony of John Sinclair before Subcommittee on General Oversight and Investigations, June 11, 1987.

<sup>70</sup>. Memorandum of March 19, 1986 from Office of Executive Legal Director to Acting Executive Director for Operations.

for the NRC to take civil or criminal action against the utility.<sup>71</sup>

Mr. John R. Sinclair, the Operations Officer within OI responsible for review of the investigative report, testified:

"Despite the utility's willful material false statements regarding its premature criticality and the OI report documenting the utility's course of action, the NRC has never taken any civil enforcement measures against Fermi for failing to report the premature criticality. Rather than using this information as a basis for regulatory action, the NRC staff took steps that had significant potential to, and in fact did, undermine OI's investigation. NRC staff (those people who work for the Executive Director for Operations) did not even wait for the OI investigation to be completed and the report to be made final before mounting a challenge. This culminated in a staff memorandum, the mere existence of which made any enforcement action based on the material false statement virtually impossible. In essence, the staff, either inadvertently or intentionally, undermined the OI investigative findings."<sup>72</sup>

Mr. Sinclair continued:

"This ELD [Office of Executive Legal Director] Memorandum, dated March 19, 1986, could well have been written by the utility. It uses the facts selectively and mischaracterizes the law (as interpreted by the NRC's Office of General Counsel). It strains to put the utility in the most favorable light possible and tries to shift the blame to NRC employees for failing to discover information being withheld by the utility. In essence, the memorandum reflects the views of an advocate, not of an objective observer, let alone a regulatory agency.

"ELD stated that there was no evidence to support a view that there was an intent not to tell the NRC of the premature criticality. ELD failed to address numerous material facts from the OI report."<sup>73</sup>

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<sup>71</sup>. Ibid.

<sup>72</sup>. Prepared Testimony of John Sinclair.

<sup>73</sup>. Ibid.

Mr. Sinclair concluded:

"The ELD memorandum . . . reflects an attitude by NRC staff to support the utilities. With its report on Fermi, OI gave the staff the opportunity to take meaningful enforcement action. The staff chose to support the cat and mouse game played by the utility.

"If staff's intention was to undermine an enforcement action against the utility in order to get Fermi up and running, it was successful."<sup>74</sup>

It is of note that this was not an isolated instance of actions or attempts within the NRC to limit the effectiveness of the Office of Investigations:

- (1) there was a proposal to have OI report to the Executive Director for Operations rather than to the Commission;
- (2) the NRC established thresholds for OI's authority to investigate;
- (3) an Investigations Referral Board was established to screen cases prior to referral to OI; [this Board was effectively deactivated just days before the Subcommittee's June 11th hearing]; and
- (4) OI has not been provided with the resources necessary to carry out its responsibilities effectively.<sup>75</sup>

Apparently the NRC has lost sight of why the Office of Investigations was created. To achieve credibility, the NRC established an office independent of the NRC staff, which would report directly to the Commission and would be composed of trained, professional investigators.<sup>76</sup> The attempts at reining

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<sup>74</sup>. Ibid.

<sup>75</sup>. Prepared Testimony of Commissioner Asselstine, June 11, 1987.

<sup>76</sup>. Prepared Testimony of Commissioner Asselstine, June 11, 1987.

in OI to limit its independence are clearly contrary to the NRC's initial objective in establishing the office.

The underlying problem may well have been identified by the Assistant Attorney General of the Justice Department's Criminal Division in his comments on the NRC proposal to place OI under the Executive Director for Operations (EDO):

"Personnel and organizational components within and under the EDO's office not only inspect nuclear facilities under operation or construction, but have also been sponsoring licensee applications before NRC administrative boards. Thus, the existence, detection and full disclosure of violations by OI may not only be (and have been) inconsistent with prior NRC inspection reports, but with positions taken by the NRC before its licensing boards."

The Assistant Attorney General continued:

"We also understand that certain licensees and their representatives favor the proposed realignment, as well as a reduction in the number of OI investigators. Efforts by those who may be or have become subjects of OI investigations to restrict its ability to obtain evidence are not unique."<sup>77</sup>

Thus, in the view of the Department of Justice, the NRC staff and NRC licensees do not perceive it to be in their interest to have a truly independent OI, provided with the resources necessary to properly investigate licensee wrongdoing.

**E. NRC HAS RESTRICTED ITS OWN STAFF IN REQUIRING UPGRADES TO EXISTING PLANTS**

Any change to be required to existing nuclear power plants, generic or plant-specific, is controlled by a single NRC rule,

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<sup>77</sup>. Letter of March 18, 1985 from Stephen S. Trott, Assistant Attorney General, U.S. Department of Justice to Chairman Nunzio J. Palladino, NRC.

known as the backfit rule. Since 90 percent of the nuclear power plants in the United States are presently on line, the backfit rule controls whether, and to what extent, new safety requirements will be imposed on the vast majority of nuclear plants in this country.

In August, 1987, the United States Court of Appeals in D.C. rejected the NRC's backfit rule, calling it "an exemplar of ambiguity and vagueness."<sup>78</sup> The Court explicitly stated that it suspected the NRC of deliberately fashioning a vague rule. The Court also held that the NRC may not consider cost as a factor in achieving adequate protection of nuclear power plants. On September 10, 1987, the NRC issued a new proposed rule in an attempt to satisfy the Court's concerns.<sup>79</sup>

The rule in question establishes a rigorous process in order for the NRC to require a change in design or procedure at an existing nuclear power plant. Prior to the NRC requiring a safety upgrade, called a backfit, it must demonstrate two things based on a detailed analysis: first, that there will be a substantial increase in the overall protection of public health and safety; and second that the costs of compliance (to the utility) are justified in view of the increased protection (to the public).<sup>80</sup>

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<sup>78</sup>. Union of Concerned Scientists v. NRC (D.C. Cir. 1987).

<sup>79</sup>. 52 FR 34223.

<sup>80</sup>. Ibid. and 50 FR 38097 (9/20/85).

By placing this burden of proof on the staff, the NRC has created a presumption against safety improvements to existing power plants. There is strong evidence that the rule has already had a chilling effect on the technical experts in the NRC. Simply put, the NRC is no longer requiring safety improvements for nuclear power plants.<sup>81</sup>

Further, the critical term "adequate protection" is undefined. "Adequate protection" is the dividing line used to determine when a backfit will, and will not, be subject to a full cost benefit analysis. Unless a proposed backfit would result in more than "adequate protection," the NRC may not consider cost in deciding whether to require that improvement.<sup>82</sup> Therefore, absent a definition of "adequate protection," the staff can have no clear idea of what it must demonstrate in order to exclude a backfit from the full cost-benefit analysis. This is precisely what the Court of Appeals was concerned about when it concluded that because the rule does not define or fully explain its terms, it fails to "constrain the Commission from operating outside the

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<sup>81</sup>. Letter of February 13, 1987 from NRC Chairman Zech to Chairman Bevill, Subcommittee on Energy and Water Development, House Committee on Appropriations. See also, Report of General Accounting Office, "Nuclear Regulation, Process for Backfitting Changes in Nuclear Plants Has Improved," which identified the need for backfits (p. 35) and management problems in backfitting process, pp. 63-4. The report was written before NRC had experience under the 1985 backfit rule (GAO/RCED-86-27, December, 1985).

<sup>82</sup>. Union of Concerned Scientists v. NRC

bounds of the statutory scheme."<sup>83</sup> The new rule does not bring uniformity to the backfit process. Rather, it lends itself to abuse and convenient interpretations.

The importance of backfits to safety cannot be overestimated. The vast majority of nuclear power plants were designed in the 1960's. At the behest of the nuclear industry, the NRC granted construction permits and operating licenses before all safety questions were resolved. It was understood that these questions would eventually be answered, at which point the necessary changes to the plants would be made.<sup>84</sup> The time for payment of this debt to public safety has arrived. With this rule, the NRC is encouraging the industry to default on its commitment.

On October 14, 1987, the Subcommittee held a hearing on the backfit issue. A number of essential facts came out at that hearing.

First, the President's Commission on Three Mile Island identified the need for more, not fewer backfits.

Second, the NRC lacked an adequate administrative record on which to base a need for the backfit rule. There was virtually no evidence, either in the form of anecdotes or comprehensive studies, identified in any of the four Federal Register publications that demonstrated the existence of a problem in need of a solution. There were simply unsupported conclusory

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<sup>83</sup>. Ibid.

<sup>84</sup>. Commission Meeting, 5/22/84, pp. 29-30.

allegations of an overabundance of backfits and a need for discipline of the NRC staff.

It is of note that on September 28, 1983, the NRC had published its Advanced Notice of Proposed Rulemaking identifying a backfit problem and calling for suggested solutions. The very next day, Chairman Palladino responded to an inquiry from Senator George Mitchell, by stating that he knew of no unnecessary backfits.<sup>85</sup>

A memorandum from a member of the NRC's Regulatory Review Task Force, the group responsible for the backfit rule, was clear in its admission:

"The documentation to support the Commission's implicit concession of mismanagement and regulatory overkill does not appear in the proposed final rule, any more than it did in the 1983 Advanced Notice of Proposed Rulemaking or in the 1984 Notice of Proposed Rulemaking.

"I believe that when the Commission proposes a major fix, it has an obligation to spell out what is broken, how it got that way, and why the proposed fix will solve the problem. This rule does not do that.

"But ten years of service with the NRC have left me with too high a regard for the professionalism and integrity of the NRC safety staff to accept readily the suggestion that a capricious and erratic band of bureaucrats is regulating for the fun of it."<sup>86</sup>

Third, the backfit rule has, in fact, stopped the imposition of safety improvements at nuclear power plants. The vague terms of the rule and placement of a significant, if not

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<sup>85</sup>. Letter of September 29, 1983.

<sup>86</sup>. Memorandum of April 23, 1985 from Peter Crane, Esq. to Executive Director for Operations and Members of Regulatory Review Task Force.

insurmountable, burden of proof on the NRC staff have taken their toll.

In his comments on the final backfit rule in 1985, Commissioner James K. Asselstine predicted the following:

"The consequence of this rule is to limit the NRC staff's and even the Commission's ability to identify and correct safety weaknesses at the nuclear power plants in operation and under construction in this country. As a result, these weaknesses are likely to persist until they cause serious operating events or accidents which pose a direct threat to the health and safety of the public."

Commissioner Asselstine concluded:

"In adopting this backfitting rule, the Commission continues its inexorable march down the path toward non-regulation of the nuclear industry."<sup>87</sup>

Commissioner Asselstine's prediction was accurate. In 1986, the first full calendar year under the backfit rule, by the NRC's own figures, the NRC did not impose a single plant-specific backfit, and it required only one generic (industry-wide) backfit which cost utilities less than \$8,000 per plant.<sup>88</sup>

Fourth, the NRC has chosen to deal with what it characterizes as a management problem by issuance of a rule rather than a policy statement or other management directive. The NRC has not explained the rationale for this decision in the administrative record, nor did it do so when presented the

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<sup>87</sup>. 50 FR 38106-38110 (September 20, 1985).

<sup>88</sup>. Letter of February 13, 1987 from Chairman Zech to Chairman Beville.

opportunity at the Subcommittee hearing.<sup>89</sup> By issuing a rule, the NRC has given utilities the legal ability to challenge the NRC for any procedural failing. Utilities will also be able to enforce the substantive provisions of this rule against the NRC.<sup>90</sup>

There is a pointed irony in the NRC's position. The NRC is unwilling to issue a rule on fitness for duty -- protection against drug and alcohol abuse at nuclear power plants. Rather than issuing a rule, the NRC relented to industry pressure and issued an unenforceable policy statement. In other words, when the industry says "Trust us," the Commission goes along. Yet, the Commission will not afford its own staff the same trust. As a result, the staff cannot enforce the fitness for duty policy statement against the industry to prevent drug and alcohol abuse. But, the industry can enforce the backfit rule against the staff. The Commission is permitting the nuclear industry to regulate the staff of the NRC.

As a follow-up to the hearing of October 14, 1987, the Subcommittee asked the NRC a series of detailed questions on the backfit issue (Letter of October 27, 1987). The NRC's answers (Letter of December 2, 1987) were largely unresponsive, misleading, disingenuous or simply inconsistent with information previously provided by the NRC. It would promote a more

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<sup>89</sup>. Testimony of Chairman Zech before Subcommittee on General Oversight and Investigations, Oct. 14, 1987, unrevised transcript, pp. 70-77, 79-80.

<sup>90</sup>. 50 FR 38106-38110 (September 20, 1985).

constructive airing of issues for the NRC to seriously address inquiries from the Congress.

#### IV. FINDINGS

On the basis of the Subcommittee's investigations and hearings, it finds that:

- (1) The NRC has left prevention of drug and alcohol abuse at nuclear power plants (fitness for duty) up to the nuclear industry. The NRC relented to industry pressure and issued an unenforceable policy statement rather than a binding regulation. The NRC took this action despite its own recognition of drug and alcohol problems among those who operate nuclear power plants, and despite a demonstrated inability of many in the nuclear industry to adequately police themselves. Thus, there is no law, no regulation, no national or industry standard which requires nuclear power plants to take preventive measures to protect against drug and alcohol abuse. It comes as no surprise that there have been numerous incidents of employees of nuclear power plants under the influence of drugs or alcohol at plant sites.
- (2) The NRC held meetings behind closed doors with a number of nuclear utilities which resulted in an

"interpretation" of an NRC rule that had been intended to ensure that plants can be shut down safely in the event of a fire. The "interpretation," in effect, allowed utilities to grant themselves exemptions to the rule without consulting with the NRC. In essence, this negated the intent of the rule which had been promulgated in reaction to the Browns Ferry fire.

- (3) Commissioner Thomas M. Roberts has engaged in a pattern of conduct that demonstrates a disdain for the process of government, constitutes malfeasance in his role as Commissioner, and reflects a continuing closeness with those he is supposed to be regulating at arms length, the nuclear industry.
- (4) Those at the highest levels of the NRC staff, including the Executive Director for Operations, interfered with and undermined an investigation of licensee wrongdoing performed by NRC's Office of Investigations. The actions of the staff made it difficult, if not impossible, for the NRC to take civil or criminal enforcement action against a utility which had violated the Atomic Energy Act and NRC's regulations by knowingly making false statements to the NRC. The

importance of a lack of credibility on the part of nuclear utilities cannot be overstated. The NRC relies on the representations of the utilities in performing its routine regulatory functions. Moreover, the NRC has failed to properly support the Office of Investigations so that it can carry out meaningful and truly independent investigations. Instead, the NRC has taken affirmative steps to limit the effectiveness of its investigators.

- (5) Despite the lack of an administrative record reflecting a demonstrated problem, the NRC issued a rule that seriously restricts the ability of its own staff to require safety improvements (backfits) at existing nuclear plants. The rule places a severe burden of proof on the NRC staff which has virtually ended the imposition of safety improvements to existing nuclear plants.

The NRC promulgated this rule under the guise of a need for discipline and improved management. However, if that had been the NRC's true objective, there was no need to foist a near impossible burden of proof on the staff, nor was it necessary to issue a rule when a policy statement or other management directive would have been sufficient. By issuing a rule which the

industry can enforce against the NRC, the Commission is permitting the nuclear industry to regulate the staff of the NRC. Management problems must be addressed with management tools, not by handing the industry rights that should only be exercised by the Commission.

## V. CONCLUSIONS

Over the past several years, the Nuclear Regulatory Commission has demonstrated an unhealthy empathy for the needs of the nuclear industry to the detriment of the safety of the American people. The NRC has failed to maintain an arms length regulatory posture with the commercial nuclear power industry. On a number of occasions, the NRC has acted as if it were the advocate for, and not the regulator of, the nuclear industry. The Subcommittee does not draw these conclusions on the basis of an isolated incident. We arrive at these conclusions based on a pattern of Commission actions taken over a number of years. These actions were by no means trivial; each of them involved important issues of public safety.

Time and again the NRC has afforded the relief sought by the industry. In the case of fitness for duty, fire prevention and backfits, such relief was contrary to previous determinations of the Commission itself.

It is not the intention of the Subcommittee to impugn the integrity of those at the NRC. With very few exceptions, during the course of our investigation, we have found those at the NRC

to be an honest, sincere and highly capable group of professionals truly dedicated to their jobs. We do not doubt their good faith in striving to increase the safety of nuclear power plants. However, the nuclear industry has been extremely successful in obtaining relief from regulatory processes and requirements it deemed burdensome. In some cases, this has been accomplished after private meetings; in other cases, it has been accomplished by ultimatums; and, in some cases, the lack of any adequate administrative record can only leave the public guessing at why, in fact, the NRC acceded to the expressed concerns of the industry. These are problems traceable to a lack of proper direction from the leadership of the NRC.

The NRC has said on numerous occasions that communication with the utilities is extremely useful in accomplishing its regulatory mission. We agree that communication is important. However, the NRC must distinguish between communication and accommodation. In pursuing communication, the Commission must respect the process of government, afford the same access and privileges to those who have different points of view, be open with the public regarding the nature of those communications, and be cognizant that either impropriety or the appearance of impropriety undermines public confidence in the Commission and in nuclear energy.

## VI. RECOMMENDATIONS

On the basis of the Subcommittee's investigation and the foregoing findings and conclusions, the Subcommittee makes the following recommendations:

- (1) The Nuclear Regulatory Commission should promptly promulgate a fitness for duty rule to prevent drug and alcohol abuse at nuclear power plants.
  
- (2) The NRC should establish procedures for the issuance of rules and formal and informal interpretations thereof which make all communications (at the decisionmaking level) with outside parties a matter of public record and provide other interested parties with an opportunity to comment on the subject of the communication.
  
- (3) The Congress should establish by statute an Office of Investigations (OI), with the necessary authority to conduct full and proper independent investigations of licensee wrongdoing. This office should be answerable only to the Commission. OI should be able to initiate and carry out investigations and refer criminal cases to the Justice Department without interference, even from the Commission. The Congress should also create a statutory Inspector General, appointed by the President, and confirmed by the Senate, with the

necessary authority for the full and proper investigation of fraud, waste and abuse by NRC employees. Both offices should be provided with the resources necessary to fully and effectively carry out their authorities.

- (4) The President should heed the request to dismiss Commissioner Thomas Roberts for malfeasance and, the NRC should make its standards of conduct explicitly applicable to the Commissioners.
  
- (5) The NRC should withdraw its backfit rule and issue a policy statement which requires the staff to justify all backfits but significantly reduces the burden of proof; defines all material terms; and does not emphasize cost over public safety. Absent NRC action, the Congress should enact legislation to address these issues.

Sam Gejdenson, Chairman

George Miller

Peter DeFazio

## DISSENTING VIEWS

FOR PROCEDURAL AND SUBSTANTIVE REASONS, WE CANNOT CONCUR IN THIS OVERSIGHT REPORT SUBMITTED TO SUBCOMMITTEE MEMBERS FOR REVIEW.

THE MINORITY APPLAUDS THE CHAIRMAN AND THE MAJORITY STAFF ON THE HEARINGS AND CERTAIN ASPECTS OF THE REPORT ON THE NUCLEAR REGULATORY COMMISSION (NRC). CERTAINLY AFTER THE TRAGIC CHERNOBYL INCIDENT, NO ONE CAN DOUBT THE NEED FOR EXTRA PRECAUTIONS AND SAFEGUARDS.

THE MINORITY MUST, HOWEVER, NOTE THAT THIS REPORT HAS PROPOSED A BAND-AID SOLUTION TO A PROBLEM WHEREIN MAJOR RECONSTRUCTIVE SURGERY IS NEEDED.

THE NRC WAS ESTABLISHED TO LICENSE NUCLEAR POWER PLANTS NOT TO GOVERN AND REGULATE THEM. IT HAS DONE A LAUDABLE JOB OF LICENSING AND WE CONGRATULATE ITS MEMBERS. WE DO BELIEVE, NEVERTHELESS, THAT A MAJOR REORGANIZATION IS NOW NECESSARY. THE NRC IS MANAGED BY FIVE COMMISSIONERS WHICH IS TANTAMOUNT TO A GOVERNMENT BY COMMITTEE AND IS DOOMED TO FAILURE. A GOVERNMENT BY COMMITTEE IS NO GOVERNMENT AT ALL. WE, IN THE MINORITY WOULD THEREFORE PROPOSE A COMPLETE REORGANIZATION. IN THIS WE ENVISION A NRC HEADED BY AN ADMINISTRATOR WHO REPORTS AND IS RESPONSIBLE TO THE PRESIDENT AND THE PEOPLE.

THE MINORITY WOULD LIKE ALSO TO DISASSOCIATE OURSELVES FROM REMARKS WHEREIN ALLEGATIONS AGAINST COMMISSIONERS AND THE COMMISSION ARE VOICED BUT NOT PROVEN. WE FIND THAT THE REPORT IS OVERLY CRITICAL AND IN SOME INSTANCES VICIOUS. WE ALSO BELIEVE

THAT ALL ALLEGATIONS AGAINST COMMISSIONER THOMAS ROBERTS ARE UNPROVEN AND IF DOUBTS REMAIN, THE MATTER SHOULD BE REFERRED TO THE DEPARTMENT OF JUSTICE. WE DO NOT AGREE THAT HE HAS BEEN PROVEN GUILTY OF MALFEASANCE.

WE, THE MINORITY, PLEDGE OURSELVES TO WORK WITH THE NRC AND THE ADMINISTRATION TO BUILD A NEW STRUCTURE WHEREIN NUCLEAR POWER CAN BE SAFE AND CONTRIBUTE SUBSTANTIALLY TO THE UNITED STATES' SUPPLY OF ENERGY.

DENNY SMITH

JAMES HANSEN



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**NRC COZINESS WITH INDUSTRY**

**Nuclear Regulatory Commission Fails to Maintain  
Arms Length Relationship with the Nuclear Industry**

**An Investigative Report**

**Subcommittee on General Oversight and Investigations**

**Committee on Interior and Insular Affairs**

**U.S. House of Representatives  
100th Congress  
First Session**

**December 1987**

COMMITTEE ON INTERIOR AND INSULAR AFFAIRS

HOUSE OF REPRESENTATIVES

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NUCLEAR REGULATORY COMMISSION  
FAILS TO MAINTAIN ARMS LENGTH  
RELATIONSHIP WITH NUCLEAR INDUSTRY

I. INTRODUCTION

The Nuclear Regulatory Commission is charged with regulating commercial nuclear power in the United States.<sup>1</sup> Unlike its predecessor, the Atomic Energy Commission, the NRC is not intended to promote the development of nuclear power.<sup>2</sup> The role of the NRC is to protect public health and safety as it relates to nuclear energy.<sup>3</sup>

Nuclear power is an important energy resource in this country. The future success of nuclear power depends on the safe operation of nuclear power plants and on the American people having confidence in the nuclear industry and in those who regulate it. This confidence can only be instilled by vigorous regulation of nuclear energy.

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1. Atomic Energy Act of 1954, 42 U.S.C., Section 2011 et seq.; Energy Reorganization Act of 1974, 42 U.S.C., Section 5801 et seq.

2. Ibid.

3. Ibid.

Many who support relaxed regulation of the nuclear industry do so out of a sincere desire to see the industry succeed. This view is extremely shortsighted. In the near term, relaxing safety regulation may slightly reduce nuclear utility operating costs; however, in the long run, lax regulation could lead to an accident which could have disastrous consequences for the American people and for the future of the American nuclear power industry.

Nowhere is there a greater need for close scrutiny by regulators and investigators than in the nuclear industry. Close scrutiny is needed because so much is at stake. Also, due to the inherent danger of nuclear power plants, there is little margin for error. Nuclear power is not a forgiving technology. It is a technology both delicate and potentially devastating, which can affect the health, welfare and indeed the lives of millions of people.

Many in the nuclear industry have done an admirable job of making sure that their nuclear plants are built and operated safely. However, regulation is not geared to those in any industry who would take precautionary measures even if it were not legally required. Regulation is addressed to those who would not take such steps on their own. (A report performed under the auspices of the nuclear industry, in fact, recommended that those nuclear plants that achieve operational excellence and those

whose performance is lacking should both be identified by name in a periodic accounting by the industry.)<sup>4</sup>

Beginning in April, 1987, the Subcommittee on General Oversight and Investigations conducted a six-month investigation of the relationship between the NRC and the commercial nuclear industry. The Subcommittee held two hearings, the first on June 11, 1987, and the second on October 14, 1987, both in Washington, D.C.

On the basis of the Subcommittee's investigation, we have reached several conclusions: First, the Nuclear Regulatory Commission has not maintained an arms length regulatory posture with the commercial nuclear power industry. Second, the NRC has, in some critical areas, abdicated its role as regulator altogether. Third, the NRC has tried to stifle its Office of Investigations (OI) from performing independent investigations of wrongdoing by licensees.

## II. SUBCOMMITTEE INVESTIGATION

In the course of its inquiry, the Subcommittee collected extensive documentary evidence from the NRC and conducted numerous interviews of NRC personnel and of others from outside the Commission.

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<sup>4</sup>. Report of Task Committee of Utility Nuclear Power Oversight Committee (UNPOC), Sillin, et al., "Leadership in Achieving Operational Excellence," p.16 (1986).

On June 11, 1987, the Subcommittee held a hearing at which the following witnesses appeared:

U.S. Nuclear Regulatory Commission

Chairman Lando W. Zech, Jr.

Commissioner James K. Asselstine

Commissioner Frederick M. Bernthal

Commissioner Kenneth M. Carr

Commissioner Thomas M. Roberts

Loren L. Bush, Jr., Chief, Program Development and Review Section, Safeguards Branch, Division of Reactor Inspection and Safeguards, Office of Nuclear Reactor Regulation, NRC

James A.F. Kelly, Senior Security Inspector for NRC, Region IV

Eugene T. Pawlik, Director, Office of Investigations, Region III, NRC

John R. Sinclair, Operations Officer, Office of Investigations, NRC

On October 14, 1987, the Subcommittee held a hearing at which the following witnesses appeared:

Ellyn Weiss, Esq., General Counsel, Union of Concerned Scientists

U.S. Nuclear Regulatory Commission

Chairman Lando W. Zech, Jr.

Commissioner Frederick M. Bernthal

Commissioner Thomas M. Roberts

Commissioner Kenneth Rogers

Dr. Victor Gilinsky, Former Commissioner, U.S. Nuclear  
Regulatory Commission

Barton Z. Cowan, Esq., representing American Nuclear Energy  
Council (ANEC) and Nuclear Management and Resources  
Council (NUMARC)

Based on the investigation and hearings, the Subcommittee identified five significant instances in which the NRC failed to maintain a proper regulatory relationship with the nuclear industry:

1. With respect to the prevention of drug and alcohol abuse at nuclear power plants (fitness for duty), the NRC relented to industry pressure and issued an unenforceable policy statement rather than a binding regulation.
2. With respect to fire protection at nuclear plants, the NRC held meetings behind closed doors with a number of utilities and complied with the desires of the industry by issuing an interpretation that took the teeth out of a previously issued fire protection regulation.
3. Commissioner Thomas M. Roberts engaged in behavior that constitutes malfeasance and reflects a continuing closeness with the nuclear industry.

4. NRC staff interfered with and undermined an investigation of licensee wrongdoing at the Fermi 2 plant in Michigan, conducted by NRC's Office of Investigations.
  
5. Despite the lack of an adequate administrative record demonstrating a problem in need of a solution, the Commission issued a rule severely restricting the ability of its own staff to require safety improvements (backfits) at existing nuclear plants.

### III. FACTUAL ANALYSIS

#### A. FITNESS FOR DUTY

In March of 1982, the NRC became aware of drug and alcohol problems among those who operate nuclear power plants.<sup>5</sup> The NRC staff identified "an alarming increase in reported drug-related incidents," a "wide range of personnel implicated" and "a pervasiveness of the reports on a national basis."<sup>6</sup> In response to this report, the NRC issued proposed rulemaking just five months later.<sup>7</sup> In July, 1984, the Commission approved publication of a final rule that would have required licensees to

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<sup>5</sup>. NRC IE Information Notice No. 82-05.

<sup>6</sup>. Ibid.

<sup>7</sup>. 47 FR 33980, (August 5, 1982).

establish and implement procedures designed to provide reasonable assurance that personnel with unescorted access at power reactors are not under the influence of drugs or alcohol.<sup>8</sup> However, the Commission's approval of the final rule was made subject to the willingness of the two major industry groups to develop detailed program elements and acceptance criteria in lieu of NRC prescriptive guidance.<sup>9</sup>

It was the industry position that any rulemaking or other form of mandatory requirement undermines the voluntary efforts of the industry toward self-improvement. One of the industry groups, the Nuclear Utility Management and Resources Committee (NUMARC), conditioned its cooperation in issuing the detailed guidance of a fitness for duty program on the NRC's not promulgating a Fitness for Duty rule.<sup>10</sup> In the NRC's own words, "They want the NRC to promulgate a Policy Statement or Generic Letter regarding fitness for duty which would not establish enforceable requirements."<sup>11</sup>

Loren Bush, NRC's staff contact on fitness for duty, provided the Subcommittee with his perspective on the industry position:

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<sup>8</sup>. Staff Requirements - Affirmation/Discussion and Vote, 7/9/84.

<sup>9</sup>. Ibid.

<sup>10</sup>. Memorandum of 9/4/84 from Executive Director for Operations to Commissioners.

<sup>11</sup>. Ibid.

"I regarded this as dictatorial and an attempt to intimidate the NRC, to gain the upper hand. My reaction was, 'Who the hell is regulating who?'"<sup>12</sup>

Nevertheless, in October of 1984, in response to the industry reaction, the Commission directed the staff to withhold action on the rule and to prepare a policy statement in coordination with the industry.<sup>13</sup>

NRC's staff prepared a policy statement and, at the direction of the Executive Director for Operations (EDO), met with the industry groups to ensure that industry clearly understood and was able to accomplish the program.<sup>14</sup> This policy statement reflected the wishes of the industry. Subsequent to this meeting, the Commission diluted the requirements of the policy statement, and in July of 1986 approved its publication, and the withdrawal of the previously approved rule.<sup>15</sup> The policy statement was published in the Federal Register on August 4, 1986.<sup>16</sup>

By issuance of the policy statement rather than a rule, the NRC has left it to the industry to regulate itself in the area of drug and alcohol abuse. The policy statement is only an expression of concern on the part of the NRC. It mandates

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<sup>12</sup>. Prepared Testimony of Loren Bush before Subcommittee on General Oversight and Investigations, June 11, 1987.

<sup>13</sup>. Staff Requirements Memorandum, 10/24/84.

<sup>14</sup>. Prepared Testimony of Loren Bush before Subcommittee on General Oversight and Investigations, June 11, 1987.

<sup>15</sup>. Staff Requirements Memorandum, 7/7/86.

<sup>16</sup>. 51 FR 27921, (August 4, 1986).

nothing. It does not require that the industry comply with any standards or take any action regarding drug and alcohol abuse. It does not even require the utilities to comply with the industry guidance on drug and alcohol abuse.<sup>17</sup>

By virtue of the policy statement, the utilities are not required to prohibit anyone who is drunk or on drugs from being permitted access to the vital areas of the plants nor are they required to have a program to ensure that one who is under the influence of drugs or alcohol does not gain access to vital areas of the plant. The policy statement is not enforceable.<sup>18</sup>

Unless there is an immediate threat to health or safety, the NRC may take no regulatory action against a utility for failing to prevent drug and alcohol abuse. That is, until something goes wrong which creates an immediate threat, the NRC can take no regulatory action against a utility that has not set up a reasonable program to prevent against future safety problems resulting from drug and alcohol abuse. Therefore, even if the NRC discovers a series of problems with drug and alcohol abuse at a plant, unless it is aware of a person under the influence of drugs or alcohol at a particular time, it is unlikely to be able to take enforcement action against the utility.<sup>19</sup> Also, the

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17. Ibid.

18. Ibid.

19. Prepared Testimony of Loren Bush before Subcommittee on General Oversight and Investigations, June 11, 1987.

policy statement is too vague to explain what the Commission deems to be an adequate fitness for duty program.

Not only does the policy statement require no action on the part of the utilities, but the industry's own guidelines are optional, not mandatory. The utilities can pick and choose which ones they want to comply with.<sup>20</sup>

NRC official Loren Bush explained the bottom line of the NRC approach:

"As a result, the NRC has essentially left it to the nuclear industry to regulate itself. For its part, the industry developed voluntary guidelines but has prescribed no standards for the prevention of drug and alcohol abuse. Thus, there is no law, no regulation, no national or industry standard, which requires nuclear power plants to protect against drug and alcohol abuse."<sup>21</sup>

This abdication by the NRC of its responsibilities has not been without adverse consequences.

As an NRC inspector with extensive experience testified:

"My observations are that the industry usually does not seek to identify these kinds of problems, often fails to investigate those problems brought to its attention, often fails to report such problems to the NRC, and does not always cooperate with the NRC when the NRC occasionally decides to investigate. The NRC, for its part, has rarely investigated allegations of drug and alcohol problems. My experience reflects that for the most part, the utilities have demonstrated their unwillingness or inability to pursue the allegations."<sup>22</sup>

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<sup>20</sup> . Ibid.

<sup>21</sup> . Ibid.

<sup>22</sup> . Prepared Testimony of James A.F. Kelly before Subcommittee on General Oversight and Investigations, June 11, 1987.

There have been numerous incidents of employees of nuclear power plants under the influence of drugs or alcohol at plant sites. In December of 1986, the NRC acknowledged that there had been at least one incident of drug or alcohol abuse at no fewer than 61 of this country's nuclear plants (about 3 out of every 5 plants) in the previous five years.<sup>23</sup> Moreover, even when it is confronted with reports of drug and alcohol problems, the NRC chooses to refer such reports to the utilities rather than pursuing them itself.

At the June 11th hearing, NRC inspector Kelly described the manner in which two separate sets of incidents of drug and alcohol abuse were handled at two separate plants. The similarities between the two cases are frightening.

At the Cooper Nuclear Station in Nebraska, there were a number of incidents of drug and alcohol abuse discovered by the NRC in a random inspection during a limited two-month time frame. The NRC referred the matter to the utility, turning over all of its investigative leads. There was evidence of smoking of marijuana by two security officials in the owner-controlled area, a security guard unconscious, drunk or drugged in the security ready room, a licensed operator reporting to work drunk, and the smoking of marijuana inside the protected area of the plant as well as inside the diesel generator room which contains vital equipment.<sup>24</sup>

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<sup>23</sup>. Letter of December 9, 1986 from Chairman Zech.

<sup>24</sup>. Testimony of James A.F. Kelly, June 11, 1987.

NRC inspectors also uncovered drug and alcohol problems at the Fort St. Vrain plant in Colorado. At both the Cooper plant and at Fort St. Vrain, the NRC instructed its inspectors to turn their work product over to the utilities. In neither case did the NRC take any regulatory action. In neither case did anything come of the utilities' follow-up investigation. In both cases, the individuals to whom the utilities had assigned responsibility for investigating were, within a year and a half, in legal trouble themselves. One was arrested for possession of drugs, and two others were indicted for taking kickbacks.<sup>25</sup>

Based on these case examples, and moreover on Mr. Kelly's experience as a veteran NRC investigator, it was his opinion that these incidents may well represent just the tip of the iceberg of drug and alcohol abuse at nuclear power plants.<sup>26</sup>

In spite of the prevalence of the problem,

" . . . few if any of the utilities have comprehensive programs to deal effectively with drug and alcohol abuse. For the most part, they are not capable of self-policing, nor do they report problems to the NRC. The NRC typically chooses not to pursue these matters even referring problems to utilities that have demonstrated their unreliability."<sup>27</sup>

Subsequent to the June 11th hearing, every member of the Subcommittee signed a letter to the NRC urging adoption of an enforceable fitness for duty rule.<sup>28</sup> Notwithstanding the

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<sup>25</sup> . Ibid.

<sup>26</sup> . Ibid.

<sup>27</sup> . Ibid.

<sup>28</sup> . Letter of July 13, 1987.

testimony at the hearing, its own earlier recognition of the pervasiveness of drug and alcohol abuse in the industry, and its own statistics, the NRC rejected the Subcommittee suggestion that prompt action was appropriate. The NRC preferred to wait until 1988 when the 18-month trial period for the policy statement expires to even consider issuing an enforceable regulation.<sup>29</sup>

#### B. FIRE PROTECTION

In 1975, there was a nearly disastrous fire at the Browns Ferry nuclear power plant, which disabled essential safety systems. As a result of that fire, the NRC issued proposed, and then final (Part 50, Appendix R), fire protection regulations.<sup>30</sup> The purpose of the rule was to ensure that plants are shut down safely in the event of a fire. Many in the nuclear industry considered these regulations to be unnecessarily burdensome, and a number of utilities brought suit challenging their promulgation. The NRC prevailed in court, and the rule was upheld both substantively and procedurally (Connecticut Light and Power Company et al. v. NRC, 673 F.2d 525 (D.C. Cir. 1982)).

Having failed through the courts to compel the NRC to withdraw the rule, industry representatives asked for the NRC's

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<sup>29</sup>. Letter of August 14, 1987 from NRC Chairman Lando W. Zech, Jr. to Chairman Sam Gejdenson. In a Commission briefing of December 1, 1987, Chairman Zech apparently reversed his earlier statement and supported a fitness for duty rule. The Subcommittee applauds Chairman Zech's position and urges that he take the lead in seeing that the NRC issue a rule without further delay.

<sup>30</sup>. 45 FR 36082 (May 29, 1980).

help in reducing the 'burdensomeness' of the rule.<sup>31</sup> They bypassed the technical experts, the fire protection engineers, and jumped the chain of command up to staff management.<sup>32</sup>

The utilities first met with the Deputy Division Director in charge of fire protection. The utilities informed him that if they didn't get a satisfactory solution from him they would immediately visit Mr. Victor Stello, who was then Deputy Executive Director for Operations. That same day they visited Mr. Stello who essentially instructed a staff attorney to prepare an interpretation document that would satisfy the utilities.<sup>33</sup> These meetings between Mr. Stello and the utilities were not public.<sup>34</sup> In fact, the NRC's own fire protection engineers were excluded from these meetings at which interpretations of fire protection standards were being developed.<sup>35</sup>

The fire protection rule had been subjected to an open administrative process of notifying the public of proposed rulemaking and providing an opportunity to comment on the proposal before issuing a final rule. Regardless of the process involved in developing the rule, the 'interpretation' was created behind closed doors. The meeting between the NRC and utility

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<sup>31</sup>. Testimony of Commissioner James K. Asselstine before Subcommittee on General Oversight and Investigations, June 11, 1987 (p. 119 of unrevised transcript).

<sup>32</sup>. Ibid.

<sup>33</sup>. Ibid.

<sup>34</sup>. Ibid, p. 130.

<sup>35</sup>. Ibid.

officials was not made public; there was no notice of the meeting, and no other interested parties were invited.<sup>36</sup>

The upshot of this meeting was an "interpretation" of the rule, issued in 1985, that granted the industry the relief it had sought. By virtue of the "interpretation," each utility was permitted to come up with its own modifications and interpretations of the NRC's fire protection standards without coming to the NRC for approval.<sup>37</sup> Based on their own analyses, the utilities would modify NRC's standards without so much as consulting with the NRC. Unless the NRC later discovers through an inspection what fire standards the utility had applied, the Commission might never know.<sup>38</sup>

In contrast, under the NRC rule, the utilities would have had to demonstrate to the NRC's satisfaction that a particular interpretation or approach to fire protection was appropriate. Under this formal exemption process, there would have been a dialogue between the NRC's staff and the utility, after which the NRC would have made an administrative determination on the adequacy of the utility's proposal to protect against fire at its nuclear power plant.<sup>39</sup>

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<sup>36</sup>. Ibid.

<sup>37</sup>. Ibid., pp. 135-6, 150.

<sup>38</sup>. Ibid., pp. 135, 150.

<sup>39</sup>. Ibid., pp. 134-35.

Also of note is a memorandum of May 29, 1984, from Mr. Sheldon Trubatch, an attorney in NRC's Office of General Counsel, identifying problems with the interpretation. Mr. Trubatch was the NRC attorney who successfully defended the lawsuit challenging the fire protection regulation. He expresses concern that the "interpretation" represents such a fundamental change in the rule as to be a modification of the rule, and therefore should go through notice and comment rulemaking. (There is a memorandum of October 24, 1985, from NRC's Office of General Counsel presenting the opposite point of view). Mr. Trubatch concludes that

"Therefore, to now interpret Appendix R so as to not incorporate a fundamental lesson learned at Browns Ferry would appear to directly contradict the Commission's intent in promulgating Appendix R."<sup>40</sup>

The interpretation was nevertheless issued without being offered for public notice and comment.

The NRC's fire protection engineers and inspectors objected to the role reversal that put the burden on the staff to discover problems with a utility's deviations from NRC standards, rather than placing the burden on the utility to justify such deviations up front to the NRC staff. They also felt that the interpretation made it impossible for them to do their jobs: before making a physical inspection of a plant to determine compliance, they needed to see a detailed analysis of the plant

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<sup>40</sup>. Memorandum of May 29, 1984.

and a justification for the exemption.<sup>41</sup> Under the interpretation, they would receive neither.

Another concern of the NRC fire protection engineers was that under the rule there would have been a technical review before changes were made to the plant. Pursuant to the interpretation, physical changes are made to the plant before the NRC has an opportunity to perform a review.<sup>42</sup>

At the June 11th hearing, Commissioner Asselstine, who had debriefed most, if not all, of the key participants involved in the process of issuing the interpretation, summed up the course of events:

". . . however you come out on the merits of the changes that were ultimately approved by the Commission, whether you agree or disagree with them, one has to conclude that this process was wrong.

"The fact is that the people who were responsible for this area of our activities weren't even consulted. They didn't even get their chance to make their case to Mr. Stello. Instead, the industry came trotting in. After they hadn't been able to persuade the staff, they go straight to Mr. Stello; he accommodates them and he didn't even give the fire protection engineers a chance to say here is what is wrong with what they are asking for; here is why it hurts our ability to do our job.

"And from that point forward, what those guys were told was, whatever your concerns are, you have to understand that it was a management decision by the agency and that was essentially the answer that was given to them throughout the process.

"We had eight fire protection engineers in this agency at the time. Five of those eight people felt so strongly about what had been done that they filed differing professional opinions, and that is not something in this agency that is

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<sup>41</sup>. Asselstine, p. 135-6.

<sup>42</sup>. Ibid., pp. 137-8.

done lightly. It is also not something that necessarily does your long-term career with the agency any great good.

"Those people stuck their necks out and they said we feel so strongly about this that we are filing differing professional opinions. I think however you come out on the merits, whether they were right or whether the industry was right, you have to acknowledge that this was the wrong process and it certainly was not an arms length dealing with the industry."<sup>43</sup>

### C. MALFEASANCE BY COMMISSIONER THOMAS M. ROBERTS

Failure to maintain an arms length regulatory relationship with the nuclear industry is a serious problem when it involves the NRC as an institution. It is also of great concern when it involves high ranking NRC officials, such as individual commissioners. The actions of Commissioner Thomas M. Roberts have raised such concerns.

On at least three separate occasions, the actions of Commissioner Roberts reflected a close relationship with the industry that he was supposed to be regulating. Commissioner Roberts' behavior reflects more than poor judgment. It demonstrates a disdain for the process of government and constitutes malfeasance in his role as Commissioner.

In 1983, important NRC documents relating to quality assurance problems at the Waterford plant in Louisiana were apparently leaked from Commissioner Roberts' office to the owner of the utility, Mid-South Utilities. The initials "TR" appeared

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<sup>43</sup>. Ibid., pp. 150-1.

in the upper right hand corner of the leaked document.<sup>44</sup> Prior to coming to the Nuclear Regulatory Commission, Mr. Roberts had been president of Southern Boiler and Tank Works which sold several millions of dollars of equipment to utilities owned by Mid-South.<sup>45</sup> Commissioner Roberts denies leaking this information himself or having someone else in his office leak the information.<sup>46</sup>

In 1985 when the leak was discovered by NRC's Office of Investigations, Commissioner Roberts terminated the internal NRC investigation into the leak. Commissioner Roberts did not refer the matter to the Office of Inspector and Auditor, the NRC office responsible for investigating wrongdoing by NRC employees. Rather Commissioner Roberts simply asked his staff if they knew the source of the leak and then terminated the investigation by collecting all documentary evidence in their possession relating to the leak.<sup>47</sup> On April 9, 1987, Commissioner Roberts testified under oath before the Senate Governmental Affairs Committee that

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<sup>44</sup>. Memorandum of June 8, 1983 from James K. Joosten to Richard C. DeYoung.

<sup>45</sup>. Testimony of Commissioner Thomas M. Roberts before Subcommittee on General Oversight and Investigations, June 11, 1987, (pp. 82-85 of unrevised transcript).

<sup>46</sup>. Ibid., p. 87.

<sup>47</sup>. Sen. Rep. No. 100-150, Senate Committee on Governmental Affairs, p. 65.

he had destroyed all such documents. He later corrected his testimony asserting that he had found some of the documents.<sup>48</sup>

Therefore, not only did Mr. Roberts fail to properly refer this matter to the appropriate NRC investigators, he took steps to destroy evidence of a leak to a licensee, and presented false testimony to the Congress regarding such destruction of evidence.

The Subcommittee on General Oversight and Investigations uncovered two other significant incidents in which Mr. Roberts demonstrated a serious lack of judgment and a failure to respect the process of government.

In one instance, Mr. Roberts attempted to interfere with an investigation by the Office of Government Ethics. In another, he ignored the request of a United States Attorney and the repeated reminders of NRC's Solicitor regarding meetings with defense counsel in a criminal case brought on the basis of false statements made to the NRC.

In 1986, Mr. Roberts attempted to interfere with an ongoing investigation conducted by the Office of Government Ethics (OGE) into conflict of interest charges against Steven White, director of the Tennessee Valley Authority's (TVA) nuclear power program. Mr. Roberts visited Mr. David Martin, director of OGE, to get

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<sup>48</sup>. Letter of April 28, 1987, from Commissioner Roberts to Senator Glenn.

some definitive answers regarding the charges, and as he put it, "straighten things out."<sup>49</sup>

At the time he visited Mr. Martin of OGE, Mr. Roberts was under consideration for nomination to the TVA Board of Directors. In testimony before the Post Office and Civil Service Investigations Subcommittee, Mr. Martin stated that "He [Roberts] called me because he was a prospective nominee to the TVA Board of Directors and asked me what in fact was going on down there...."<sup>50</sup> Roberts also called Martin two days after Martin's testimony to say that he (Roberts) didn't appreciate the way Martin had described their conversation in his testimony.<sup>51</sup>

During the course of his meeting with Martin, Mr. Roberts:

- o continued to pursue the conversation even after Martin had said that "there is something to look into" in the conflict of interest charges;
- o challenged OGE's jurisdiction over TVA;
- o stressed the importance of getting TVA's nuclear program turned around; and
- o "panted on him pretty hard," saying that the TVA problem was a \$12-\$15 billion problem.<sup>52</sup>

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<sup>49</sup>. Memorandum to file from Courtney. Courtney is Courtney Ward of the House Post Office and Civil Service Investigations Subcommittee, who along with a colleague, interviewed Mr. Roberts. This memorandum is the product of the notes taken by the two investigators.

<sup>50</sup>. Transcript of Hearing, September 29 and 30, 1986, p. 91.

<sup>51</sup>. Memorandum to file from Courtney. See Footnote 49 above.

<sup>52</sup>. Ibid.

Thus, Roberts went to OGE as an advocate for TVA, an organization that he might soon join, and one that he, as a Commissioner of NRC, was then regulating. Mr. Roberts' actions reflect a clear conflict of interest on his part.

Mr. Roberts again displayed his lack of respect for the seriousness of government in the context of a criminal case brought against the utility that operates the D.C. Cook nuclear power plant. The Department of Justice brought this case which had been developed by the NRC based on alleged violations of NRC's statute and regulations and alleged material false statements made by the utility to the NRC.

It was contemplated that, as part of the criminal prosecution, the Commissioners would appear before the grand jury. The United States Attorney, Mr. John Smietanka, requested that the Commissioners inform him of meetings with defense counsel so that he (the U.S. Attorney) would be given the opportunity to be present. Despite repeated reminders from NRC's Solicitor, Mr. Roberts chose to ignore this request.

On September 4, 1985, Mr. Gerald Charnoff, attorney for the defendant, D.C. Cook, contacted Mr. Roberts to meet with him that same day.<sup>53</sup> Mr. Roberts' assistant (Mr. J.M. Cutchin) visited with NRC Solicitor Briggs, who again advised Mr. Cutchin of the U.S. Attorney's request that the Commissioners not talk with

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<sup>53</sup>. Memorandum to File from J.M. Cutchin re meeting with Gerald Charnoff (9/10/85).

defense counsel without the prosecution present.<sup>54</sup> Mr. Cutchin said that Mr. Roberts had a 4:00 p.m. meeting scheduled with defense counsel. The Solicitor offered to call the U.S. Attorney, but Mr. Cutchin declined, saying that he would relay the Solicitor's message to Mr. Roberts.<sup>55</sup> The U.S. Attorney was not called.<sup>56</sup>

Nevertheless, the meeting between Mr. Roberts and defense counsel took place that day. Defense counsel began by explaining that his purpose in asking for the meeting was to discuss with Commissioner Roberts the meeting Roberts had had with the U.S. Attorney regarding Roberts' prospective testimony before the grand jury. Even after Mr. Roberts was informed of the purpose of the meeting, he allowed the meeting to continue and was perfectly willing to discuss his earlier conversation with the U.S. Attorney. At that point, Cutchin advised defense counsel Charnoff of the U.S. Attorney's request.<sup>57</sup> There is no mention in the recorded memorandum of any attempt by Mr. Roberts even to call the U.S. Attorney. Mr. Cutchin simply noted that the U.S. Attorney's attendance was obviously not possible on such short notice.<sup>58</sup> It is not clear why the meeting was so urgent that it

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<sup>54</sup>. Handwritten Memorandum to File from NRC Solicitor Briggs, (9/4/85).

<sup>55</sup>. Ibid.

<sup>56</sup>. Memorandum to File from J.M. Cutchin re meeting with Gerald Charnoff (9/10/85).

<sup>57</sup>. Ibid.

<sup>58</sup>. Ibid.

had to take place the same day that Mr. Charnoff requested it.<sup>59</sup> The grand jury was not going to convene for at least another month.<sup>60</sup>

Mr. Cutchin also stated at the meeting that he would make notes from which he would prepare minutes to be made available to the U.S. Attorney. However, in the last sentence of Mr. Cutchin's memorandum it states "Most of the discussion centered around what had been said by Commissioner Roberts during his meeting with the U.S. Attorney."<sup>61</sup> There is nothing else in the memorandum that describes what Mr. Roberts discussed with defense counsel regarding his meeting with the U.S. Attorney, despite the fact that it comprised "most of the discussion" at Mr. Roberts' meeting with defense counsel.<sup>62</sup> Nothing more was sent to the U.S. Attorney by the NRC.<sup>63</sup> Is this one sentence on what turned out to be the bulk of the meeting to be considered the "minutes" of that meeting?

Mr. Roberts was apparently more concerned with satisfying the desires of counsel for the defense than with cooperating with the U.S. Attorney. He agreed to meet with counsel for the defense on the same day that the meeting was requested. For the

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<sup>59</sup>. Ibid.

<sup>60</sup>. Memorandum to File from NRC Solicitor Briggs, (9/17/85).

<sup>61</sup>. Memorandum of 9/10/85 from Cutchin to File.

<sup>62</sup>. Ibid.

<sup>63</sup>. Letter of May 26, 1987 from U.S. Attorney Smietanka to Chairman Sam Gejdenson.

better part of 90 minutes, he was happy to discuss with defense counsel his earlier conversation with the U.S. Attorney. Yet, Roberts was unwilling to honor the simple request of the government's lawyer that he be given the opportunity to be present at meetings with counsel for the defense. Nor was Mr. Roberts sufficiently concerned with the needs of the U.S. Attorney to provide him with more than a one-sentence description of what had transpired with defense counsel for most of 90 minutes. It is of note that Mr. Roberts opposed taking criminal action against D.C. Cook and was therefore not in favor of the U.S. Attorney's prosecution of the case.<sup>64</sup>

The U.S. Attorney's request was neither unreasonable nor onerous. He was bringing a case based on facts developed by the NRC and alleging violations of NRC's statute and regulations. If the leadership of the NRC was going to meet with defense counsel, the U.S. Attorney simply sought the courtesy of being made aware of what the government officials were saying to the defense. NRC's Solicitor had perceived the request to be of sufficient importance to remind Mr. Roberts' office of it on at least two occasions. Since the focus of defense counsel's interest was the conversation that had taken place between Roberts and the U.S. Attorney, the request is even more understandable. Further, it would have been easy for Roberts to honor the request. But he

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<sup>64</sup>. Memorandum of March 26, 1984 from Commissioner Roberts to Chairman Palladino; Dissenting Views of Commissioner Roberts on D.C. Cook (4/26/84); Unrevised Transcript of June 11, Hearing of Subcommittee on General Oversight and Investigations, pp. 112-113.

would not favor the government's lawyer with the simple courtesy that had been requested.

Commissioner Roberts' failure to respect the wishes of the U.S. Attorney is reflective of the same disdain for the governmental process that he displayed in his destruction of evidence of leaked information, and his attempted meddling in the investigation conducted by the Office of Government Ethics. At the June 11th hearing, even when Mr. Roberts was confronted with the evidence of the meeting with defense counsel, he continued to insist that neither the meeting nor the discussion at the meeting was improper. He also testified that he was aware of no facts that would refute the information contained in the relevant documents.<sup>65</sup>

These three separate incidents represent a pattern of coziness with the nuclear industry on the part of one commissioner. It is the Subcommittee's position that they also represent malfeasance sufficient to justify removal of Commissioner Roberts by the President. On June 17, 1987, Subcommittee Chairman Sam Gejdenson asked the President to remove Mr. Roberts. On June 26, 1987, the White House acknowledged Chairman Gejdenson's request but has never made a substantive response, either to grant or deny the request.

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<sup>65</sup>. Unrevised Transcript of Hearing of Subcommittee on General Oversight and Investigations, June 11, 1987, pp. 110-112. Also see Letter of June 19, 1987, from Commissioner Roberts to Chairman Gejdenson, and Letter of June 24, 1987, from Chairman Gejdenson to the President.

**D. NRC STAFF UNDERMINED INVESTIGATION OF LICENSEE WRONGDOING**

The NRC's Office of Investigations (OI) is responsible for conducting independent investigations of licensee wrongdoing, and for referring, as warranted, such investigations to the Department of Justice for criminal prosecution.

The Office of Investigations found that a nuclear reactor, Fermi 2 in Michigan, had gone prematurely critical (had started up unintentionally) and that the utility knowingly withheld this information from the NRC;<sup>66</sup> this is a potential violation of the Atomic Energy Act which could be the basis of a civil enforcement action by the NRC or a criminal prosecution by the Department of Justice. Despite an OI report documenting the utility's actions, the NRC would not determine that there had been a material false statement on the part of the utility. Rather than using the OI report as a basis for regulatory action, the NRC staff chose to try to discredit the report by issuing its own analysis.<sup>67</sup>

The staff document ignored compelling evidence. The utility knew of the fact that the reactor had gone prematurely critical, but despite the presence of NRC personnel at the plant site, did not inform the NRC for over a week after the occurrence. The

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<sup>66</sup>. Office of Investigations, February 14, 1986, Report of Investigation, Enrico Fermi 2, Material False Statement.

<sup>67</sup>. Memorandum of March 11, 1986 from Office of Executive Legal Director to Acting Executive Director for Operations.

utility itself was treating this information as highly significant, with calls to supervisors after midnight, weekend meetings, and studies and re-studies of the problem. The utility sat through the Commission licensing meeting without mentioning a word of the premature criticality, even though it knew that the NRC was unaware of it. The NRC official who signed the license said that had he known of the premature criticality, he would not have issued the license. The NRC was not informed of the premature criticality until the day the utility had the license in hand.<sup>68</sup>

Yet, the NRC staff, before it had seen the final report, was preparing its own response to what it understood to be the OI finding.<sup>69</sup>

The NRC staff opinion found that despite all the evidence to the contrary, including the perceptions of the utility and NRC personnel, the fact that this plant went prematurely critical was not material to the licensing process.<sup>70</sup> Despite the evidence, the staff's instinct was to act as an advocate for the utility, implicate NRC employees for their roles in the situation, and issue an opinion the effect of which would make it problematic

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<sup>68</sup>. OI Report of 2/14/86. Prepared Testimony of Eugene T. Pawlik Before Subcommittee on General Oversight and Investigations, June 11, 1987.

<sup>69</sup>. Prepared Testimony of John Sinclair before Subcommittee on General Oversight and Investigations, June 11, 1987.

<sup>70</sup>. Memorandum of March 19, 1986 from Office of Executive Legal Director to Acting Executive Director for Operations.

for the NRC to take civil or criminal action against the utility.<sup>71</sup>

Mr. John R. Sinclair, the Operations Officer within OI responsible for review of the investigative report, testified:

"Despite the utility's willful material false statements regarding its premature criticality and the OI report documenting the utility's course of action, the NRC has never taken any civil enforcement measures against Fermi for failing to report the premature criticality. Rather than using this information as a basis for regulatory action, the NRC staff took steps that had significant potential to, and in fact did, undermine OI's investigation. NRC staff (those people who work for the Executive Director for Operations) did not even wait for the OI investigation to be completed and the report to be made final before mounting a challenge. This culminated in a staff memorandum, the mere existence of which made any enforcement action based on the material false statement virtually impossible. In essence, the staff, either inadvertently or intentionally, undermined the OI investigative findings."<sup>72</sup>

Mr. Sinclair continued:

"This ELD [Office of Executive Legal Director] Memorandum, dated March 19, 1986, could well have been written by the utility. It uses the facts selectively and mischaracterizes the law (as interpreted by the NRC's Office of General Counsel). It strains to put the utility in the most favorable light possible and tries to shift the blame to NRC employees for failing to discover information being withheld by the utility. In essence, the memorandum reflects the views of an advocate, not of an objective observer, let alone a regulatory agency.

"ELD stated that there was no evidence to support a view that there was an intent not to tell the NRC of the premature criticality. ELD failed to address numerous material facts from the OI report."<sup>73</sup>

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<sup>71</sup> . Ibid.

<sup>72</sup> . Prepared Testimony of John Sinclair.

<sup>73</sup> . Ibid.

Mr. Sinclair concluded:

"The ELD memorandum . . . reflects an attitude by NRC staff to support the utilities. With its report on Fermi, OI gave the staff the opportunity to take meaningful enforcement action. The staff chose to support the cat and mouse game played by the utility.

"If staff's intention was to undermine an enforcement action against the utility in order to get Fermi up and running, it was successful."<sup>74</sup>

It is of note that this was not an isolated instance of actions or attempts within the NRC to limit the effectiveness of the Office of Investigations:

- (1) there was a proposal to have OI report to the Executive Director for Operations rather than to the Commission;
- (2) the NRC established thresholds for OI's authority to investigate;
- (3) an Investigations Referral Board was established to screen cases prior to referral to OI; [this Board was effectively deactivated just days before the Subcommittee's June 11th hearing]; and
- (4) OI has not been provided with the resources necessary to carry out its responsibilities effectively.<sup>75</sup>

Apparently the NRC has lost sight of why the Office of Investigations was created. To achieve credibility, the NRC established an office independent of the NRC staff, which would report directly to the Commission and would be composed of trained, professional investigators.<sup>76</sup> The attempts at reining

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<sup>74</sup> . Ibid.

<sup>75</sup> . Prepared Testimony of Commissioner Asselstine, June 11, 1987.

<sup>76</sup> . Prepared Testimony of Commissioner Asselstine, June 11, 1987.

in OI to limit its independence are clearly contrary to the NRC's initial objective in establishing the office.

The underlying problem may well have been identified by the Assistant Attorney General of the Justice Department's Criminal Division in his comments on the NRC proposal to place OI under the Executive Director for Operations (EDO):

"Personnel and organizational components within and under the EDO's office not only inspect nuclear facilities under operation or construction, but have also been sponsoring licensee applications before NRC administrative boards. Thus, the existence, detection and full disclosure of violations by OI may not only be (and have been) inconsistent with prior NRC inspection reports, but with positions taken by the NRC before its licensing boards."

The Assistant Attorney General continued:

"We also understand that certain licensees and their representatives favor the proposed realignment, as well as a reduction in the number of OI investigators. Efforts by those who may be or have become subjects of OI investigations to restrict its ability to obtain evidence are not unique."<sup>77</sup>

Thus, in the view of the Department of Justice, the NRC staff and NRC licensees do not perceive it to be in their interest to have a truly independent OI, provided with the resources necessary to properly investigate licensee wrongdoing.

**E. NRC HAS RESTRICTED ITS OWN STAFF IN REQUIRING UPGRADES TO EXISTING PLANTS**

Any change to be required to existing nuclear power plants, generic or plant-specific, is controlled by a single NRC rule,

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<sup>77</sup>. Letter of March 18, 1985 from Stephen S. Trott, Assistant Attorney General, U.S. Department of Justice to Chairman Nunzio J. Palladino, NRC.

known as the backfit rule. Since 90 percent of the nuclear power plants in the United States are presently on line, the backfit rule controls whether, and to what extent, new safety requirements will be imposed on the vast majority of nuclear plants in this country.

In August, 1987, the United States Court of Appeals in D.C. rejected the NRC's backfit rule, calling it "an exemplar of ambiguity and vagueness."<sup>78</sup> The Court explicitly stated that it suspected the NRC of deliberately fashioning a vague rule. The Court also held that the NRC may not consider cost as a factor in achieving adequate protection of nuclear power plants. On September 10, 1987, the NRC issued a new proposed rule in an attempt to satisfy the Court's concerns.<sup>79</sup>

The rule in question establishes a rigorous process in order for the NRC to require a change in design or procedure at an existing nuclear power plant. Prior to the NRC requiring a safety upgrade, called a backfit, it must demonstrate two things based on a detailed analysis: first, that there will be a substantial increase in the overall protection of public health and safety; and second that the costs of compliance (to the utility) are justified in view of the increased protection (to the public).<sup>80</sup>

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<sup>78</sup>. Union of Concerned Scientists v. NRC (D.C. Cir. 1987).

<sup>79</sup>. 52 FR 34223.

<sup>80</sup>. Ibid. and 50 FR 38097 (9/20/85).

By placing this burden of proof on the staff, the NRC has created a presumption against safety improvements to existing power plants. There is strong evidence that the rule has already had a chilling effect on the technical experts in the NRC. Simply put, the NRC is no longer requiring safety improvements for nuclear power plants.<sup>81</sup>

Further, the critical term "adequate protection" is undefined. "Adequate protection" is the dividing line used to determine when a backfit will, and will not, be subject to a full cost benefit analysis. Unless a proposed backfit would result in more than "adequate protection," the NRC may not consider cost in deciding whether to require that improvement.<sup>82</sup> Therefore, absent a definition of "adequate protection," the staff can have no clear idea of what it must demonstrate in order to exclude a backfit from the full cost-benefit analysis. This is precisely what the Court of Appeals was concerned about when it concluded that because the rule does not define or fully explain its terms, it fails to "constrain the Commission from operating outside the

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<sup>81</sup>. Letter of February 13, 1987 from NRC Chairman Zech to Chairman Bevill, Subcommittee on Energy and Water Development, House Committee on Appropriations. See also, Report of General Accounting Office, "Nuclear Regulation, Process for Backfitting Changes in Nuclear Plants Has Improved," which identified the need for backfits (p. 35) and management problems in backfitting process, pp. 63-4. The report was written before NRC had experience under the 1985 backfit rule (GAO/RCED-86-27, December, 1985).

<sup>82</sup>. Union of Concerned Scientists v. NRC

bounds of the statutory scheme."<sup>83</sup> The new rule does not bring uniformity to the backfit process. Rather, it lends itself to abuse and convenient interpretations.

The importance of backfits to safety cannot be overestimated. The vast majority of nuclear power plants were designed in the 1960's. At the behest of the nuclear industry, the NRC granted construction permits and operating licenses before all safety questions were resolved. It was understood that these questions would eventually be answered, at which point the necessary changes to the plants would be made.<sup>84</sup> The time for payment of this debt to public safety has arrived. With this rule, the NRC is encouraging the industry to default on its commitment.

On October 14, 1987, the Subcommittee held a hearing on the backfit issue. A number of essential facts came out at that hearing.

First, the President's Commission on Three Mile Island identified the need for more, not fewer backfits.

Second, the NRC lacked an adequate administrative record on which to base a need for the backfit rule. There was virtually no evidence, either in the form of anecdotes or comprehensive studies, identified in any of the four Federal Register publications that demonstrated the existence of a problem in need of a solution. There were simply unsupported conclusory

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<sup>83</sup>. Ibid.

<sup>84</sup>. Commission Meeting, 5/22/84, pp. 29-30.

allegations of an overabundance of backfits and a need for discipline of the NRC staff.

It is of note that on September 28, 1983, the NRC had published its Advanced Notice of Proposed Rulemaking identifying a backfit problem and calling for suggested solutions. The very next day, Chairman Palladino responded to an inquiry from Senator George Mitchell, by stating that he knew of no unnecessary backfits.<sup>85</sup>

A memorandum from a member of the NRC's Regulatory Review Task Force, the group responsible for the backfit rule, was clear in its admission:

"The documentation to support the Commission's implicit concession of mismanagement and regulatory overkill does not appear in the proposed final rule, any more than it did in the 1983 Advanced Notice of Proposed Rulemaking or in the 1984 Notice of Proposed Rulemaking.

"I believe that when the Commission proposes a major fix, it has an obligation to spell out what is broken, how it got that way, and why the proposed fix will solve the problem. This rule does not do that.

"But ten years of service with the NRC have left me with too high a regard for the professionalism and integrity of the NRC safety staff to accept readily the suggestion that a capricious and erratic band of bureaucrats is regulating for the fun of it."<sup>86</sup>

Third, the backfit rule has, in fact, stopped the imposition of safety improvements at nuclear power plants. The vague terms of the rule and placement of a significant, if not

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<sup>85</sup>. Letter of September 29, 1983.

<sup>86</sup>. Memorandum of April 23, 1985 from Peter Crane, Esq. to Executive Director for Operations and Members of Regulatory Review Task Force.

insurmountable, burden of proof on the NRC staff have taken their toll.

In his comments on the final backfit rule in 1985, Commissioner James K. Asselstine predicted the following:

"The consequence of this rule is to limit the NRC staff's and even the Commission's ability to identify and correct safety weaknesses at the nuclear power plants in operation and under construction in this country. As a result, these weaknesses are likely to persist until they cause serious operating events or accidents which pose a direct threat to the health and safety of the public."

Commissioner Asselstine concluded:

"In adopting this backfitting rule, the Commission continues its inexorable march down the path toward non-regulation of the nuclear industry."<sup>87</sup>

Commissioner Asselstine's prediction was accurate. In 1986, the first full calendar year under the backfit rule, by the NRC's own figures, the NRC did not impose a single plant-specific backfit, and it required only one generic (industry-wide) backfit which cost utilities less than \$8,000 per plant.<sup>88</sup>

Fourth, the NRC has chosen to deal with what it characterizes as a management problem by issuance of a rule rather than a policy statement or other management directive. The NRC has not explained the rationale for this decision in the administrative record, nor did it do so when presented the

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<sup>87</sup>. 50 FR 38106-38110 (September 20, 1985).

<sup>88</sup>. Letter of February 13, 1987 from Chairman Zech to Chairman Bevill.

opportunity at the Subcommittee hearing.<sup>89</sup> By issuing a rule, the NRC has given utilities the legal ability to challenge the NRC for any procedural failing. Utilities will also be able to enforce the substantive provisions of this rule against the NRC.<sup>90</sup>

There is a pointed irony in the NRC's position. The NRC is unwilling to issue a rule on fitness for duty -- protection against drug and alcohol abuse at nuclear power plants. Rather than issuing a rule, the NRC relented to industry pressure and issued an unenforceable policy statement. In other words, when the industry says "Trust us," the Commission goes along. Yet, the Commission will not afford its own staff the same trust. As a result, the staff cannot enforce the fitness for duty policy statement against the industry to prevent drug and alcohol abuse. But, the industry can enforce the backfit rule against the staff. The Commission is permitting the nuclear industry to regulate the staff of the NRC.

As a follow-up to the hearing of October 14, 1987, the Subcommittee asked the NRC a series of detailed questions on the backfit issue (Letter of October 27, 1987). The NRC's answers (Letter of December 2, 1987) were largely unresponsive, misleading, disingenuous or simply inconsistent with information previously provided by the NRC. It would promote a more

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<sup>89</sup>. Testimony of Chairman Zech before Subcommittee on General Oversight and Investigations, Oct. 14, 1987, unrevised transcript, pp. 70-77, 79-80.

<sup>90</sup>. 50 FR 38106-38110 (September 20, 1985).

constructive airing of issues for the NRC to seriously address inquiries from the Congress.

#### IV. FINDINGS

On the basis of the Subcommittee's investigations and hearings, it finds that:

- (1) The NRC has left prevention of drug and alcohol abuse at nuclear power plants (fitness for duty) up to the nuclear industry. The NRC relented to industry pressure and issued an unenforceable policy statement rather than a binding regulation. The NRC took this action despite its own recognition of drug and alcohol problems among those who operate nuclear power plants, and despite a demonstrated inability of many in the nuclear industry to adequately police themselves. Thus, there is no law, no regulation, no national or industry standard which requires nuclear power plants to take preventive measures to protect against drug and alcohol abuse. It comes as no surprise that there have been numerous incidents of employees of nuclear power plants under the influence of drugs or alcohol at plant sites.
- (2) The NRC held meetings behind closed doors with a number of nuclear utilities which resulted in an

"interpretation" of an NRC rule that had been intended to ensure that plants can be shut down safely in the event of a fire. The "interpretation," in effect, allowed utilities to grant themselves exemptions to the rule without consulting with the NRC. In essence, this negated the intent of the rule which had been promulgated in reaction to the Browns Ferry fire.

- (3) Commissioner Thomas M. Roberts has engaged in a pattern of conduct that demonstrates a disdain for the process of government, constitutes malfeasance in his role as Commissioner, and reflects a continuing closeness with those he is supposed to be regulating at arms length, the nuclear industry.
- (4) Those at the highest levels of the NRC staff, including the Executive Director for Operations, interfered with and undermined an investigation of licensee wrongdoing performed by NRC's Office of Investigations. The actions of the staff made it difficult, if not impossible, for the NRC to take civil or criminal enforcement action against a utility which had violated the Atomic Energy Act and NRC's regulations by knowingly making false statements to the NRC. The

importance of a lack of credibility on the part of nuclear utilities cannot be overstated. The NRC relies on the representations of the utilities in performing its routine regulatory functions. Moreover, the NRC has failed to properly support the Office of Investigations so that it can carry out meaningful and truly independent investigations. Instead, the NRC has taken affirmative steps to limit the effectiveness of its investigators.

- (5) Despite the lack of an administrative record reflecting a demonstrated problem, the NRC issued a rule that seriously restricts the ability of its own staff to require safety improvements (backfits) at existing nuclear plants. The rule places a severe burden of proof on the NRC staff which has virtually ended the imposition of safety improvements to existing nuclear plants.

The NRC promulgated this rule under the guise of a need for discipline and improved management. However, if that had been the NRC's true objective, there was no need to foist a near impossible burden of proof on the staff, nor was it necessary to issue a rule when a policy statement or other management directive would have been sufficient. By issuing a rule which the

industry can enforce against the NRC, the Commission is permitting the nuclear industry to regulate the staff of the NRC. Management problems must be addressed with management tools, not by handing the industry rights that should only be exercised by the Commission.

## V. CONCLUSIONS

Over the past several years, the Nuclear Regulatory Commission has demonstrated an unhealthy empathy for the needs of the nuclear industry to the detriment of the safety of the American people. The NRC has failed to maintain an arms length regulatory posture with the commercial nuclear power industry. On a number of occasions, the NRC has acted as if it were the advocate for, and not the regulator of, the nuclear industry. The Subcommittee does not draw these conclusions on the basis of an isolated incident. We arrive at these conclusions based on a pattern of Commission actions taken over a number of years. These actions were by no means trivial; each of them involved important issues of public safety.

Time and again the NRC has afforded the relief sought by the industry. In the case of fitness for duty, fire prevention and backfits, such relief was contrary to previous determinations of the Commission itself.

It is not the intention of the Subcommittee to impugn the integrity of those at the NRC. With very few exceptions, during the course of our investigation, we have found those at the NRC

to be an honest, sincere and highly capable group of professionals truly dedicated to their jobs. We do not doubt their good faith in striving to increase the safety of nuclear power plants. However, the nuclear industry has been extremely successful in obtaining relief from regulatory processes and requirements it deemed burdensome. In some cases, this has been accomplished after private meetings; in other cases, it has been accomplished by ultimatums; and, in some cases, the lack of any adequate administrative record can only leave the public guessing at why, in fact, the NRC acceded to the expressed concerns of the industry. These are problems traceable to a lack of proper direction from the leadership of the NRC.

The NRC has said on numerous occasions that communication with the utilities is extremely useful in accomplishing its regulatory mission. We agree that communication is important. However, the NRC must distinguish between communication and accommodation. In pursuing communication, the Commission must respect the process of government, afford the same access and privileges to those who have different points of view, be open with the public regarding the nature of those communications, and be cognizant that either impropriety or the appearance of impropriety undermines public confidence in the Commission and in nuclear energy.

## VI. RECOMMENDATIONS

On the basis of the Subcommittee's investigation and the foregoing findings and conclusions, the Subcommittee makes the following recommendations:

- (1) The Nuclear Regulatory Commission should promptly promulgate a fitness for duty rule to prevent drug and alcohol abuse at nuclear power plants.
- (2) The NRC should establish procedures for the issuance of rules and formal and informal interpretations thereof which make all communications (at the decisionmaking level) with outside parties a matter of public record and provide other interested parties with an opportunity to comment on the subject of the communication.
- (3) The Congress should establish by statute an Office of Investigations (OI), with the necessary authority to conduct full and proper independent investigations of licensee wrongdoing. This office should be answerable only to the Commission. OI should be able to initiate and carry out investigations and refer criminal cases to the Justice Department without interference, even from the Commission. The Congress should also create a statutory Inspector General, appointed by the President, and confirmed by the Senate, with the

necessary authority for the full and proper investigation of fraud, waste and abuse by NRC employees. Both offices should be provided with the resources necessary to fully and effectively carry out their authorities.

- (4) The President should heed the request to dismiss Commissioner Thomas Roberts for malfeasance and, the NRC should make its standards of conduct explicitly applicable to the Commissioners.
  
- (5) The NRC should withdraw its backfit rule and issue a policy statement which requires the staff to justify all backfits but significantly reduces the burden of proof; defines all material terms; and does not emphasize cost over public safety. Absent NRC action, the Congress should enact legislation to address these issues.

Sam Gejdenson, Chairman

George Miller

Peter DeFazio

## DISSENTING VIEWS

FOR PROCEDURAL AND SUBSTANTIVE REASONS, WE CANNOT CONCUR IN THIS OVERSIGHT REPORT SUBMITTED TO SUBCOMMITTEE MEMBERS FOR REVIEW.

THE MINORITY APPLAUDS THE CHAIRMAN AND THE MAJORITY STAFF ON THE HEARINGS AND CERTAIN ASPECTS OF THE REPORT ON THE NUCLEAR REGULATORY COMMISSION (NRC). CERTAINLY AFTER THE TRAGIC CHERNOBYL INCIDENT, NO ONE CAN DOUBT THE NEED FOR EXTRA PRECAUTIONS AND SAFEGUARDS.

THE MINORITY MUST, HOWEVER, NOTE THAT THIS REPORT HAS PROPOSED A BANDAID SOLUTION TO A PROBLEM WHEREIN MAJOR RECONSTRUCTIVE SURGERY IS NEEDED.

THE NRC WAS ESTABLISHED TO LICENSE NUCLEAR POWER PLANTS NOT TO GOVERN AND REGULATE THEM. IT HAS DONE A LAUDABLE JOB OF LICENSING AND WE CONGRATULATE ITS MEMBERS. WE DO BELIEVE, NEVERTHELESS, THAT A MAJOR REORGANIZATION IS NOW NECESSARY. THE NRC IS MANAGED BY FIVE COMMISSIONERS WHICH IS TANTAMOUNT TO A GOVERNMENT BY COMMITTEE AND IS DOOMED TO FAILURE. A GOVERNMENT BY COMMITTEE IS NO GOVERNMENT AT ALL. WE, IN THE MINORITY WOULD THEREFORE PROPOSE A COMPLETE REORGANIZATION. IN THIS WE ENVISION A NRC HEADED BY AN ADMINISTRATOR WHO REPORTS AND IS RESPONSIBLE TO THE PRESIDENT AND THE PEOPLE.

THE MINORITY WOULD LIKE ALSO TO DISASSOCIATE OURSELVES FROM REMARKS WHEREIN ALLEGATIONS AGAINST COMMISSIONERS AND THE COMMISSION ARE VOICED BUT NOT PROVEN. WE FIND THAT THE REPORT IS OVERLY CRITICAL AND IN SOME INSTANCES VICIOUS. WE ALSO BELIEVE

THAT ALL ALLEGATIONS AGAINST COMMISSIONER THOMAS ROBERTS ARE UNPROVEN AND IF DOUBTS REMAIN, THE MATTER SHOULD BE REFERRED TO THE DEPARTMENT OF JUSTICE. WE DO NOT AGREE THAT HE HAS BEEN PROVEN GUILTY OF MALFEASANCE.

WE, THE MINORITY, PLEDGE OURSELVES TO WORK WITH THE NRC AND THE ADMINISTRATION TO BUILD A NEW STRUCTURE WHEREIN NUCLEAR POWER CAN BE SAFE AND CONTRIBUTE SUBSTANTIALLY TO THE UNITED STATES' SUPPLY OF ENERGY.

DENNY SMITH

JAMES HANSEN

