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February 15, 1994

Docket No. 50-245
B14740

Mr. Joseph R. Gray
Deputy Director
Office of Enforcement
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dear Mr. Gray:

Millstone Nuclear Power Station, Unit No. 1
NRC Inspection Report No. 50-245/90-01
and Report of Investigation Case No. 1-90-008

As requested in your letter of December 23, 1993, enclosed are (1) a bracketed and (2) a redacted and bracketed version of Attachment 2 to our letter of November 30, 1993, to Thomas T. Martin on the referenced subject. These two redacted/bracketed versions specifically identify the personal privacy-related and confidential information which the company wishes to withhold from public disclosure. Northeast Nuclear Energy Company has no objection to the release of the redacted and bracketed version to the Public Document Room, notwithstanding the 10CFR2.790 designation which was provided on the original submittal.

Please contact R. M. Kacich at (203) 665-3298 if you have any questions concerning these enclosures.

Very truly yours,

NORTHEAST NUCLEAR ENERGY COMPANY

J. F. Opeka
Executive Vice President

cc: See Page 2

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cc: Mr. P. D. Swetland, Senior Resident Inspector, Millstone Unit Nos. 1, 2, and 3
Mr. William J. Raymond, Senior Resident Inspector, Haddam Neck Plant
Mr. J. F. Stolz, Project Directorate 1-4, Division of Reactor Projects
Mr. Jose A. Calvo, Assistant Director for Region I Reactors
Mr. James Lieberman, Director, Office of Enforcement
Mr. Ben B. Hayes, Director, Office of Investigations
Mr. Barry Letts, Director, Office of Investigations, Field Office, Region I

(With Bracketed and Redacted Attachment only):

U.S. Nuclear Regulatory Commission
Document Control Desk
Washington, D.C. 20555

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Redacted and Bracketed Version of Attachment

February 1994

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TO 10 C.F.R. § 2.790

ATTACHMENT 2

NU RESPONSE TO ALLEGED VIOLATION
OF 10 C.F.R. § 50.7

I. STATEMENT OF ALLEGED VIOLATION

The letter transmitting Inspection Report 50-245/90-01 states that:

> The second apparent violation is documented in the OI investigation report which determined that the engineer, who identified that the FWCI system was inoperable, was harassed by Millstone Unit 1 management. This report concluded that the engineer was harassed in an effort to influence his evaluation of the safety system and discriminated against by not being selected to fill a personnel vacancy in Millstone Unit 1 Engineering in retaliation for his technical evaluation and conclusion that were subsequently used as a basis for declaring the FWCI system inoperable.

September 10, 1993 letter from Thomas T. Martin to John F. Opeka, at 2.

II. INTRODUCTION AND OVERVIEW

NU does not believe that a violation of the Commission's employee protection provisions, 10 C.F.R. § 50.7, occurred in connection with the engineer's raising of a nuclear safety issue with respect to the FWCI system at Millstone Unit 1. The Company's view is based upon all the evidence known to the Company and upon a fair and reasonable review of that evidence.[1] There is, no

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[1] The events described are based on testimony, of which the Company is aware, provided to OI during its 1990 investigation (continued...)

doubt, testimony presented to OI of which we are not aware, and this response obviously cannot give an account of that testimony. Indeed, we assume that evidence exists that conflicts with the evidence upon which we have relied. However, when viewed in context, and taking into account evidence going to credibility and objectivity, we believe that the facts show no discrimination or harassment, as contemplated by Section 210 (now 211) of the Energy Reorganization Act or 10 C.F.R. § 50.7, occurred. The Company is prepared to respond to any specific evidence not previously available to it, and accordingly not addressed here.

At the time of the events in question, the engineer, [ ] in the Company's corporate office in Berlin, Connecticut. In August 1989, [ ] was detailed to the Millstone Unit 1 Engineering Department on a temporary basis. [ ] did not go to Unit 1 to fill a particular personnel vacancy, and [ ] still reported to a supervisor in Berlin). [ ] had expressed a desire for more plant experience, and it was determined that Unit 1 could use the additional support.

1/ (...continued)
into [ ] retaliation allegations and the FWCI reportability matter. To the extent additional facts are presented here, the Company's position is based upon other credible evidence, including how we believe witnesses would testify, if asked.

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A. Allegation of Harassment

worked on a variety of issues during temporary assignment to Unit 1, including the FWCI operability matter in the September/October 1989 time frame. apparently maintains that during the course of involvement with the FWCI issue, interacted with in a way that perceived as abrupt or insensitive. We would expect to testify that any such interaction was the result of management style and did not relate to the fact that had engaged in protected activities.

For part, had strong qualifications and numerous strengths for

[ ] 2/ What others brushed off as part of the work-a-day environment and [ ] personal style, however, [ ] apparently took as harassment and as an attempt to interfere with [ ] evaluation of FWCI system operability.3/ While we have no reason to doubt the sincerity of [ ] perceptions, which [ ] contemporaneously communicated to at least one individual of whom we are aware, [ ] has stated that [ ] interactions with [ ] were not intended as harassment or as an attempt to interfere with [ ] pursuit of the FWCI issue, and they should not reasonably have been perceived to be harassment. [ ] would testify that [ ] never attempted to discourage [ ] from performing an evaluation of the FWCI system. Rather, [ ] would maintain that [ ] asked [ ] probing questions about [ ] analysis, in an attempt to assist [ ] by discussing various theories that might be pursued to evaluate the issue. Indeed, it was [ ] who, in early November 1989, had asked [ ] to perform the evaluation, in

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2/ [ ]

3/ [ ]

connection with the formal reportability process, in the first place.

The standard for determining whether an employee has suffered "harassment" of the kind that potentially violates Section 50.7 is that the conduct must be of a nature that a reasonable nuclear power plant worker would have felt that the terms, conditions, or privileges of employment had been altered. Thus, the acts in question would have to be judged by an objective standard.[5]

In this connection, the Company sought, through [ ] counsel, to arrange an interview with [ ] for the purpose of obtaining [ ] perspectives on the matters pertaining to these issues. That request was declined, leaving the Company in the position of never having heard the bases for [ ] apparent perception that [ ] was harassed. Without the benefit of [ ] perspectives, it is difficult for the Company to have a full and complete view on whether [ ] alleged perceptions were in fact reasonable, judged by an objective standard, or whether they were the product of a particularly sensitive engineer overreacting to legitimate (perhaps even aggressive) probing by [ ] manager. In short, while the Company has no reason to doubt [ ] [ ] sincerity, we also have no basis on which to judge [ ] objectivity. Based on all the evidence known to the Company,

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[5] See NRC Enforcement Manual § 5.5.2 at pp. 5-13.

including the perceptions of numerous other engineers,[2/] it is the Company's view that, even if not ideal in terms of personal style, [ ]actions simply constituted[ ]attempt to perform a management function by asking probing questions about[ ] [ ]work. Without the requisite showing of conduct of a nature which creates an objectively hostile work environment, there can be no violation of law.

B. Allegation of Discrimination

In[ ]applied for a position in the Unit 1 Engineering Department, for which[ ]was not selected. This decision was based upon a legitimate business rationale. [ ] [ ]had the lead in the candidate interviewing because[ ]was attending operator licensing school.[

2/[

[ ]also conducted interviews of all the candidates.[ ]too, rated[ ]first among the candidates.

[ ], a legitimate basis upon which to premise an employment decision. [ ]was aware at the time[ ] interviewed the candidates that[ ]felt that[ ] was not a suitable candidate for the position based on[ ]overall Unit 1 performance, because[ ]had told[ ]so. The fact remains, however, that[ ]testified that[ ]choice of [ ]over[ ]was not in any way dictated by[ ] [ ]or by[ ]involvement in the FWCI matter.

It is the Company's belief, based on a substantial body of precedent (discussed more fully in Section IV, below), that intent is a necessary element of a § 50.7 violation for discrimination in hiring or advancement, and that, with respect to

the decision to select someone other than [ ] to fill the personnel vacancy, the determination whether Section 50.7 has been breached cannot hinge, without more, on whether [ ] perceived that adverse action had been taken against [ ] An essential element of a discrimination charge under Section 50.7 is that the employee's participation in a protected activity actually motivated his employer to take some personnel action adverse to him. An employer has not discriminated by taking adverse employment action against an employee who has engaged in protected activity if such action was motivated by legitimate business reasons that are not proven to be pretextual.

The salient point here is that the facts clearly show that the employment decision at issue -- the decision to award a job to another candidate -- was based on legitimate, business-related factors that had nothing to do with the fact that [ ] had engaged in protected activities. As Section 50.7 itself provides, an employer may make employment decisions regarding an employee based on legitimate performance assessments, and the fact that the employee may also have engaged in protected activity does not render him immune from such decisions. 10 C.F.R. § 50.7(d); see also Commonwealth Edison Co. (Braidwood Nuclear Power Station, and Units 1 and 2), LBP-87-14, 25 N.R.C. 461; 471-79, aff'd, CLI-87-07, 26 N.R.C. 1 (1987) (licensee's contractor did not violate 10 C.F.R. § 50.7(a) by terminating QC inspector,

where the nature of the issues raised by the inspector caused the contractor to lose confidence in his judgment and technical expertise). Under these facts, and without the requisite showing of intent, no violation of Section 50.7 for discrimination has occurred.

III. BACKGROUND

A. [ ] Allegations

In [ ] was not selected to fill an opening for a [ ] in the Millstone Unit 1 Engineering Department for which [ ] had applied (Personnel Vacancy Request -- "PVR" -- [ ]). [ ] communicated with the Company through an attorney regarding a potential claim against the Company under Section 210 (now 211) of the Energy Reorganization Act. Although [ ] immediate reaction upon learning of [ ] non-selection was that it was attributable to "age discrimination," this claim was never pursued by [ ] later alleged that [ ] was not selected because [ ] had raised and pursued a safety issue concerning the Millstone Unit 1 FWCI system. Following confidential communications between counsel for [ ] and NU, the Company and [ ] reached an agreement, thus resolving their differences over [ ] allegations of discrimination.

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B. NRC OI Investigation

In 1990, the NRC's Office of Investigation (OI) conducted an investigation into [ ] allegations. At OI's request, approximately thirty witnesses were interviewed, and the Company provided over 750 documents. The Company has been provided with a synopsis of OI's report, but not the report itself. The synopsis states that the OI irvestigation "substantiated that the [then] Millstone Unit 1 Superintendent [ ] and the [then] Engineering Manager [ ] discriminated against [ ] [ ] by not selecting [ ] to fill a personnel vacancy within Unit 1 Engineering in retaliation for [ ] technical evaluation and conclusion regarding the [FWCI] matter." NU disagrees with the OI conclusion based on the facts known to the Company.

C. [ ] Prior Employment History

It is important first to understand [ ] allegations against the backdrop of [ ] prior employment history. The truth in this case is found in the context. [

] These decisions are not in dispute.

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D. Chronology of Events

1. August/September 1989

As noted above, in [ ] was temporarily detailed to the Millstone Unit 1 Engineering Department. This occurred both because of departmental needs and because [ ] had expressed a desire to obtain experience working at the plant. [ ] did not go to Unit 1 to fill a particular personnel vacancy, and [ ] still reported to a supervisor in Berlin.

[ ] approved the selection of [ ] to attend [ ] at the same time [ ] was to attend

[ ](i.e., for approximately six weeks from late August until early October 1989).

In addition, [ ]would testify that[ ]told[ ] [ ]in the August 1989 time frame, that[ ]would reformulate a PVR for an engineering position at Millstone Unit 1, so that the job description included [ ]job level ([ ] [ ]). Specifically,[ ]initiated the necessary paperwork for the opening described in the PVR to be changed from [ ]to [ ]However, the job was never actually posted in this manner. Rather, as discussed more fully below, the job --[ ]-- was not posted until some months later, in February 1990, and the position was described as open to a[ ]

Some engineers (including[ ]) apparently had heard[ ]refer to this job opening as[ ]shortly after[ ]arrived at Unit 1 (in the early fall of 1989). But this (and the above-mentioned expansion of the PVR to[ ] [ ]) cannot support an inference that the job was intended solely for[ ]until[ ]became involved in the FWCI matter. Whether or not[ ]referred to the position in this manner ([ ]does not specifically recall), we would expect[ ] to testify that[ ]was thinking in the back of[ ]mind that although[ ]intended and expected[ ]to contend for the position,[ ]would utilize the several weeks it would take for the

PVR paperwork to be processed to further evaluate[ ] work. [ ]also viewed this period as a "trial period" for [ ] The testimony on this point was clear and consistent: everyone in NU management who would have reason to know recalls that this position had never actually been "promised" to[ ]nor could it have been under Company policy. In light of[ ]prior admonition to[ ]about Company policy precluding such promises when the direct-placement issue had arisen before with respect to[ ]knew that such a promise would not have been feasible.

[ ]would testify that over the intervening months that transpired between[ ]early conversations with[ ] [ ]about the job, and when the PVR had been finalized and the job posted,[ ]had begun to question whether[ ]was the right person for the position in light of[ ]performance after[ ] came to Unit 1. Specifically, in[ ]view,[

]These are, quite obviously, all legitimate performance considerations.

3. October 1989

At some point after arrived at Millstone Unit 1, [ ] was assigned to review the design for the hardware modification to be added to the FWCI minimum flow recirculation valves. As more fully discussed in Attachment 1, on October 10, 1989, [ ] initiated a Reportability Evaluation Form (REF) with respect to the FWCI system air-operated valves, apparently disagreeing with the consensus that had been reached by other engineers in the June time frame that the FWCI system was operable. That same day, [ ] forwarded the draft REF to Company offices in Berlin, where the Licensing Group received the form and routinely assigned it to the Generation Mechanical Engineering (GME) group for detailed technical evaluation. Due to competing priorities, GME did not have the resources at that time to undertake a technical evaluation of the REF. Accordingly, [ ] took the REF back for analysis by the plant.

4. November 1989

On or about November 1, 1989, [ ] gave the REF to [ ] The same day, [ ] gave it to [ ] with the assignment that [ ] complete the technical evaluation.

On or about November 8, 1989, [ ] completed [ ] reportability evaluation analysis, and sent it to Company headquarters. The evaluation concluded that the FWCI system could not be relied upon to operate during a LOCA that was coincident

with a loss of off-site power, and that because the Technical Specifications required that this system be operable, the situation was reportable. [ ]draft reportability evaluation analysis was discussed in a series of meetings and conference calls that primarily took place from November 14 to 17, 1989. NU reported the FWCI issue to the NRC on November 17, 1989. See Attachment 1, at 26.

[ ]apparently maintains[2/] that, during this time period,[ ]had prepared a number of drafts of the FWCI REF, which were rejected by[ ]disputes this.[ ] would testify that[ ]discussed various technical bases with[ ] [ ]for evaluating the FWCI REF, but that[ ]never saw any draft evaluations. In any event,[ ]apparently felt that [ ]was abrupt or insensitive towards[ ]in their interactions on the FWCI issue, and interpreted this as harassment in an attempt to influence[ ]evaluation of the issue. We are aware of one individual to whom[ ]contemporaneously communicated these feelings.

If this is[ ]version of the facts on this matter, we expect that[ ]would dispute it. We would expect [ ]to testify that[ ]never intended to discourage[ ] from performing the evaluation which, again,[ ]had assigned[ ]to

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2/ Again,[ ]has declined the Company's request to share[ ]version of the facts with the Company. The Company is thus left to surmise[ ]view of things.

perform. Rather, [redacted] would maintain that [redacted] asked [redacted] probing questions about [redacted] analysis, in an attempt to assist [redacted] by discussing various theories that might be pursued to evaluate the issue. Indeed, [redacted] apparent allegation that [redacted] attempted to improperly influence [redacted] evaluation of the FWCI system during this time period seems at odds with the fact that [redacted] requested that [redacted] perform the evaluation in the first place. If [redacted]

Again, while [redacted] may have sincerely believed that [redacted] was harassing [redacted] because [redacted] had raised a safety issue, viewed objectively given the facts we know,[1/] even if not ideal in terms of style, [redacted] actions constituted management performing a permissible and expected management function. This cannot on its face constitute harassment.

5. <u>February/March 1990</u>

In early 1990, [redacted] assumed [redacted] duties as manager of the Unit 1 Engineering Department while [redacted] attended licensing school. It was during this time that job vacancy [redacted] was actually posted (on or about [redacted]

[1/] As discussed in Section IV, below, if an employee claims he has been subjected to harassment, the acts in question should be judged by an objective standard, which would include determining whether the conduct in question was routine or extraordinary for the individual involved.

). As previously noted, were eligible to apply for the position. In light of absence while at licensing school, was asked to take the lead in the candidate interviewing and selection process. had had no direct involvement in the identification or resolution of the FWCI operability issue.

6. The Selection Process for

Six individuals submitted applications for the open engineering position. Of these six individuals, two were eliminated as not meeting the minimum education and experience requirements. The remaining four candidates, whom considered as meeting the minimum requirements for the job, were and two other engineers.

interviewed each of the four candidates for approximately 1-1½ hours. To help with the interview process, had developed both a rating scale and a list of interview questions encompassing four skill areas that were, in opinion, most pertinent to the job: Interpersonal Skills, Initiative, Technical Ability, and Development/Corporate Knowledge. has stated that, while was generally impressed by all four applicants, was the obvious

choice for the job, given the Department's needs at the time. [ ] was particularly impressed by [ ]

[ ] See Exhibit 1.

According to [ ] had made several remarks during [ ] interview indicating that [ ] would not be satisfied with the nature of the job as [ ] envisioned it, given the Department's needs at the time, and given [ ] qualifications and view of the level at which [ ] should be working. For example, when [ ] was asked (as [ ] asked all the candidates [ ] interviewed) why [ ] believed [ ] was a better choice for the position than an equally qualified candidate, [ ] responded that the question was "hypothetical" because [ ] believed [ ] should be working at a "Superintendent level." This indicated to [ ] that [ ] believed [ ] to be vastly overqualified for the position.

[ ] inferred from [ ] responses that the type of work [ ] desired was not the type of work the job offered. While the open position offered generally

routine, uncomplicated assignments, [ ] had expressed a desire to work on large, complicated projects (which were [ ] strength) and had conveyed a dislike for routine assignments. (It bears noting that the scope of assigned tasks in the job would not have been significantly altered depending on the level (i.e., [ ] at which the position was filled.)

[ ] See Exhibit 1.

Since the employee chosen would be working in [ ] department, [ ] also interviewed each of the four candidates.

[ ] See Exhibit 2.

[ ] would testify that [ ] did so because [ ] performance had been disappointing while at Unit 1 for the reasons noted above.

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On March 12, 1990, [ ] requested that [ ] complete the necessary paperwork, and process the required forms. See Exhibit 3. The Personnel Department thereafter contacted [ ] with an offer, and sent notices to the remaining candidates indicating that they had not been selected to fill the position.

In sum, this employment decision was not discriminatory. It was made by [ ] based on legitimate business reasons, and was independent of both the perceptions of others about [ ] and the FWCI issue. [ ] maintains that [ ] was not directly involved in the employment decision. Indeed, the only involvement [ ] recalls in this process was that [ ] signed off on the selection of [ ] This decision did not constitute discrimination by [ ] or [ ]

IV. NO VIOLATION OF LAW HAS OCCURRED

A. The Evidence Does Not Support a Finding of Discrimination

In cases charging a violation of Section 210 (now 211) of the Energy Reorganization Act,[5/] it must be shown that the employee's participation in a protected activity actually motivated his employer to take some personnel action adverse to him. If this obligation cannot be met through direct evidence of discrimination, there must at a minimum be facts that show a causal relationship between the protected activity and the adverse action taken against the employee. Absent credible evidence showing a causal link between the employee's protected activities and the adverse action, no presumption of discrimination can arise. Bartlik v. Tennessee Valley Authority, Case No. 88-ERA-15 (1993); Hasan v. System Energy Resources, Inc., Case No. 89-ERA-36, aff'd sub nom. Hasan v. Reich, Case No. 92-5710 (5th Cir. 1993). Moreover, regardless of any presumptions and under the case law, an employer has not discriminated by taking adverse employment action against an employee who has engaged in protected activities if such action was motivated by legitimate business reasons that are not proven to be pretextual. See St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2747 (1993); Bartlik.

5/ Section 210 was amended and redesignated as Section 211 of the Energy Reorganization Act. Energy Policy Act of 1992, § 2902, Pub.L.No. 102-486 (codified as amended at 42 U.S.C. § 5851).

The NRC's regulation concerning allegations of retaliation against reactor licensee employees, 10 C.F.R. § 50.7, is derived from and parallels the language of Section 210. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), DD-85-9, 21 N.R.C. 1759, 1764 (1985). Like Section 210, Section 50.7(a) prohibits discrimination against an employee in reprisal for the employee's having engaged in protected conduct. The regulation explicitly provides that "[t]he prohibition [against discrimination] applies when the adverse action occurs because the employee has engaged in protected activities." 10 C.F.R. § 50.7(d).

Thus, like Section 210, Section 50.7 prohibits a licensee from intentionally discriminating against an employee in reprisal for the employee's having engaged in protected activity. The Commission has emphasized that the NRC's regulatory authority to ensure public health and safety is implicated by intentional discrimination, as opposed to merely the appearance of discrimination:

> [W]hile the timing of the suspension [of an alleged discrimination victim] may have given the appearance that it was retaliatory, the evidence does not support such a conclusion. Appearances alone do not raise significant safety issues warranting a hearing....
>
> The issue ... concerns [the] Licensee's motivation in requiring [an employee who had engaged in protected activity] to take a neurophysical examination. ... While this may

have given the appearance of retaliation, the evidence does not support such an inference.

Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 N.R.C. 282, 328 (1985), modified on other grounds, 27 N.R.C. 335 (1988). Indeed, on other occasions, the NRC has determined that Section 50.7(a) is not violated where the employer had a legitimate reason for taking adverse employment action against an employee, even where it may have been entirely foreseeable that the employee would have perceived that the action was motivated by his protected activity. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-87-14, 25 N.R.C. 461, aff'd, CLI-87-07, 26 N.R.C. 1 (1987). There, the Board noted that the employee "was understandably suspect of the motive for his firing" since he had raised numerous safety concerns and "genuinely believed [that] the issues he raised were important and significant." 25 N.R.C. at 478. Nonetheless, the employer articulated a legitimate basis for the employee's firing -- that the nature of the issues he had raised caused his supervisor to lack confidence in his judgment and expertise -- and accordingly no violation of Section 50.7 had occurred. Id. at 479. See also Duke Power Co., (Catawba Nuclear Station Units 1 and 2), LBP-84-24, 19 N.R.C. 1418, 1442 (1984), aff'd, 22 N.R.C. 59 (1985) (no retaliation even though supervisor's poor communication skills may have created perception of retaliation, because supervisor had not intended to convey retaliatory impression).

As these decisions make clear, the determination whether discrimination within the meaning of Section 50.7 has occurred cannot hinge merely on whether an employee perceived that adverse action was taken against him because he had engaged in protected activity, even if the employee's perception was reasonable and understandable. Rather, Section 50.7 is violated in such cases only where the evidence points to the conclusion that the employer actually intended to discriminate against an employee because he had raised a safety issue. Where the employer demonstrates that it had a legitimate reason for the employment action, no Section 50.7 violation occurred.

Here, [ ] was not "discriminated" against in any sense, because the adverse action of which [ ] complains was motivated by legitimate business reasons, not an intent to retaliate against [ ] As is evident from the discussion above, a candidate other than [ ] was chosen to fill [ ] based on that person's suitability for and interest in the job. Conversely, [ ] had expressed a palpable disinterest in the type of tasks the job offered. Two other candidates who met the minimum standards for the position were likewise not selected, for they too were not deemed best qualified for the position. These are clearly legitimate reasons upon which to base an employment decision. Moreover, notwithstanding the fact that [ ] [ ] conducted interviews of the candidates along with [ ]

[ ]the evidence is clear that the most important input was, at bottom,[ ]as Acting Engineering Manager. [ ]is firm that his choice of[ ]was not in any way dictated by[ ]views or by[ ] protected activity. Therefore, regardless of[ ] protected activity,[ ]would not have been awarded the job[ ] sought in any event.

What is presented here, in essence, is a case where a person's performance includes what can broadly be construed to be protected activities.[9/] The performance necessarily leads his supervisor to certain conclusions regarding the person's strengths and weaknesses as an employee. The classic example is the QC inspector who reports what he perceives to be a nonconforming condition -- clearly a protected activity -- but is in error in doing so and thus demonstrates a weakness in competency or judgment. The manager of the inspector certainly would be in violation of Section 50.7 to sanction the inspector simply for reporting the false nonconformance, but equally would be remiss not to counsel or retrain the inspector to correct his shortcomings in performance. See Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), supra, 25 N.R.C. 461, 471-79. It would

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9/ Job performance at a nuclear site is necessarily intertwined with identifying, raising, and evaluating safety issues, e.g., operability evaluations, reportability determinations, engineering analyses. All of these could be considered to be protected activities.

also be lawful and reasonable for the manager to consider experience involving the inspector in determining whether the inspector should be promoted or transferred to a position of more responsibility. In short, as Section 50.7 itself provides, an employer may make employment decisions regarding an employee based on legitimate performance assessments, and the fact that the employee may also have engaged in protected activity does not render him immune from such decisions. 10 C.F.R. § 50.7(d).

In this case, [ ] evaluation of the candidates was objective, and [ ] says blind as to [ ] involvement in the FWCI matter. [ ] rated [ ] as the top candidate based upon [ ] specific qualifications for the position, which [ ] felt were better suited to the position than [ ] [ ] would have recommended [ ] for the position if [ ] had declined the position.

[ ] evaluation of [ ] suitability for the position appears to have been influenced considerably by [ ] performance during the last several months of 1989. This period included, but was not limited to, [ ] involvement in the FWCI reportability process. [ ] would testify that it was not [ ] protected activities in that process (e.g., initiating and then processing the reportability evaluation) which influenced [ ] thinking on whether [ ]

was the best candidate for the vacant position, but rather it was

This style was reflected in the events surrounding FWCI reportability and in other events during the period. Thus, would testify that overall performance was the basis for view. While there is an obvious connection between performance during the FWCI matter and evaluation of for the vacancy, under the logic of Braidwood, supra, it was permissible and certainly reasonable to base the evaluation on job performance during the conduct of protected activities.

B. The Evidence Does Not Support a Finding of Harassment

Beyond the issue of whether was appropriately not selected to fill the vacancy, the NRC has noted OI's conclusion that was "harassed in an effort to influence his evaluation of the [FWCI] safety system . . . ." September 10, 1993 letter from Thomas T. Martin to John F. Opeka, at 2. The evidence of which the Company is aware also does not support such a finding. First, the Company is aware of no evidence that was "harassed" in any sense. Being involved in a technical evaluation is a legitimate management prerogative. It is not discrimination. Moreover, as a factual matter, such a finding is at odds with the fact that it was who requested to perform the FWCI evaluation when it was

sent back to the plant in early November. While [ ] may have asked [ ] probing questions about the direction [ ] FWCI analysis was taking, that again is a management responsibility.

Even if [ ] perceived [ ] had been "harassed" by [ ] the Company is not aware of any evidence that would support a conclusion that actions taken toward [ ] constitute "discrimination" in the "terms [or] conditions ... of his employment" (10 C.F.R. § 50.7) that would violate Section 50.7. The standard that has developed for determining whether an employee has suffered "harassment" of the kind that constitutes discrimination is a fairly clear one: the employee must not only subjectively have perceived that he had been harassed, but in addition the conduct must have been "severe and pervasive enough to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive." Harris v. Forklift Systems, Inc., 62 U.S.L.W. 4004 (U.S. S. Ct., Nov. 8, 1993) (emphasis added) (addressing meaning of "discrimination" in the terms and conditions of employment under Title VII of the Civil Rights Act of 1964). See also Mitchell v. Arizona Public Service Co., Case No. 91-ERA-9 (1992) (applying Title VII precedent to Section 210 cases: complainant must show that she encountered a work environment in which the alleged harassment was so severe or pervasive that a reasonable nuclear

power plant worker would have believed that the terms, conditions, or privileges of employment had been altered).

The NRC has likewise recognized that a violation of Section 50.7 for harassment requires both a subjective perception of harassment and conduct that is so severe or pervasive so as to cause a reasonable person to believe that the work environment was abusive. See, e.g., Northeast Nuclear Energy Company, EA 92-212 (May 4, 1993). There, the NRC noted the employee's subjective belief that he had been harassed -- "These actions constitute an environment which [the complainant] personally believed . . . stifled his ability to raise safety concerns or work effectively" -- but also made clear that the mere perception of retaliation alone is not a sufficient premise for enforcement action; the perception must at least be reasonable -- "Also, a reasonable nuclear power plant employee would believe that these actions stifled his or her ability to raise safety concerns or work effectively". See EA 92-212 at 3. Were retaliatory perception itself forbidden by Section 50.7, licensees would be subject to penalties in every case in which an allegation is asserted -- at least if the employee could prove the sincerity of (or convincingly feign) such a perception. As one court recently put it: "There is no evidence, beyond plaintiff's visceral perceptions of discrimination, that race motivated defendants' decision.... 'To permit [a discrimination] action, without clear proof of a link

between the plaintiff's protected status and the adverse employment action, would cause Title VII [of the Civil Rights Act] to become a vehicle for providing compensation following an adverse employment decision to every person in a protected class.'" Cooper v. Southwark Metal Co., 1992 Westlaw 236285 (E.D. Pa.) (quoting Wright v. Allis-Chalmers, Inc., 496 F. Supp. 349 (N.D. Ala. 1980)), aff'd, 983 F.2d 1049 (3d Cir. 1992) (table). See also NRC Enforcement Manual § 5.5.2 (pp. 5-13) (emphasis added) ("discrimination should be broadly defined, and includes intimidation or harassment that could lead a person to reasonably expect that, if he/she makes allegations about what he/she believes are unsafe conditions, the compensation, terms, conditions, and privileges of employment could be affected.")

Thus, if an employee claims he has been subjected to harassment, the acts in question should be judged by an objective standard. Judged by that standard, and having been unsuccessful in learning something from [ ] to change the Company's view on this issue, the facts of which the Company is aware point to [ ] Even if [ ] sincerely perceived that [ ] was harassing [ ] or otherwise treating [ ] unfairly because of protected activity, neither [ ] perception nor the [ ] without more, is ground for a Section 50.7 violation. It appears

that only [ ] viewed as harassment what other engineers simply brushed off as part of [ ] personal style. [ ] [ ] as [ ] superior, clearly had the prerogative, if not the duty, to question and, indeed, be involved in [ ] [ ] review of the issue, to ensure that the review was properly conducted. Under these circumstances, close supervision, even if perceived by the employee to be unfair, cannot reasonably constitute a Section 50.7 violation.

For example, in Clowes v. Allegheny Valley Hosp., 991 F.2d 1159, 1162 (3d Cir.), cert. denied, Case No. 93-427 (U.S. S. Ct., Nov. 8, 1993), the court found that no discrimination against the employee had occurred, where the employee's claim that she had been forced to resign was based solely on allegedly "overzealous supervision" of her work. The court expressed concern that a contrary ruling would unduly thwart employers' efforts to insist on high job performance standards. Moreover, while the employee in the case focused on the impact that the close supervision had had on her personally, the court warned that "'the law does not permit an employee's subjective perceptions to govern'" whether discrimination had or had not occurred. Id. (citation omitted).

Certainly, there is no evidence of which the Company is aware to support a finding that the alleged harassment of [ ] [ ] was so "severe and pervasive," Harris, as to have affected the terms and conditions of [ ] employment. To the contrary, the

evidence of which the Company is aware shows that only one manager, [ ] was involved in the alleged harassment, which negates any suggestion that the entire work atmosphere in which [ ] worked was hostile to [ ] raising issues related to the FWCI matter. Indeed, from what the Company knows, [ ] did not even attempt to pursue [ ] views on the FWCI matter through alternative means or personnel, and thus could not reasonably have believed that [ ] work environment was "hostile" to [ ] concerns. In addition, the alleged harassment arises from differing opinions concerning only one technical issue -- the FWCI matter. There was no pattern of hostility toward the raising of safety issues in general -- and thus no "pervasive" hostile work environment -- but rather only an honest questioning of [ ] determinations on the FWCI issue. Moreover, there is no evidence of which the Company is aware that [ ] conduct involved any overt gestures or threats directed to Mr. Abolafia -- or indeed for that matter <u>any</u> statements or suggestions that [ ] would be penalized for expressing or defending [ ] views on the FWCI matter. If [ ]

[ ] not an attempt to suppress safety issues. The evidence of which the Company is aware simply does not demonstrate that [ ] was subjected to a pervasively hostile work environment, or "harassed" in any manner

that would rise to the level of a violation of Section 50.7. [redacted] it was not illegal.

In sum, absent persuasive evidence (and there is none) that the Company's legitimate reasons for not selecting [redacted] for the position that [redacted] ultimately received are false, and that the real reason that [redacted] was not selected was that [redacted] had engaged in protected activity, there can be no Section 50.7 violation for discrimination. Similarly, neither [redacted] nor the Company can be charged with harassment for the manner in which [redacted] supervised [redacted] during the period in which the FWCI issue arose, even if [redacted] sensed that [redacted] was being unfairly managed, for [redacted] supervision of [redacted] cannot in itself be deemed "harassment," nor is the Company aware of any acts that would create the pervasively abusive work environment that constitutes a violation of law. The Company believes that the facts thus do not support a violation of Section 50.7.

V. ENFORCEMENT CONSIDERATIONS

While the Company believes that no violation of Section 50.7 occurred, if the NRC concludes that a violation did occur, no NRC enforcement action is warranted in this case. The NRC intends, through its enforcement actions, to send messages to NRC licensees that will deter future similar conduct. This is not a typical NRC

enforcement action involving technical issues that are clear in colors of black and white. The colors in this case are shades of gray, in that it deals with personalties, appearances, subtleties of communication and subjective perceptions. Given the facts of this case and recent enforcement history at Northeast Utilities, enforcement action at this time will serve no additional purpose. These events occurred several years ago, and preceded substantial management changes in the Company's nuclear program and the substantial efforts made by the Company to ensure that an optimum work environment exists at its nuclear plants. The importance NRC places on these matters is well understood.

It is clear that the NRC has great latitude in deciding whether or not to take enforcement action. See the NRC's General Statement of Policy and Procedure for Enforcement Actions, Section VII.B(6) (57 Fed. Reg. at 5805) ("the appropriate Deputy Executive Director may reduce or refrain from issuing a civil penalty or a Notice of Violation for a Severity Level II or III violation based on the merits of the case after considering the guidance in this statement of policy and such factors as the age of the violation, the safety significance of the violation, the overall performance of the licensee, and other relevant circumstances, including any that may have changed since the violation . . . ."). See also Duke Power Company (Catawba Nuclear Station, Units 1 and 2), DD-85-9, 21 NRC 1759, 1771 (1985).

The NRC has in the past exercised its discretion not to take enforcement action (even where it determined that a violation of NRC regulations had occurred) where the potential violation was several years old; extensive remedial actions had been taken; significant management changes had been instituted since the incidents in question; and the safety significance of the violation was minimal. In Niagara Mohawk (Nine Mile Point Nuclear Power Station, Unit 1), EA 89-179 (February 23, 1990), the NRC exercised its discretion with respect to imposition of a civil penalty because of the age of the violation and because significant management changes had recently been made. In Texas Utilities (Comanche Peak Station), EA 88-278 (February 28, 1989), the Commission similarly exercised its discretion by not issuing a civil penalty because the violation had occurred several years earlier, the overall safety significance was minimal, extensive corrective actions were already underway when the violation occurred, and it was unlikely that the violation would be repeated. Id. at 2. In Tennessee Valley Authority, (Browns Ferry Units 1, 2, 3, Sequoyah Units 1 and 2, Watts Bar Units 1 and 2), EA 86-93 (July 10, 1986), the civil penalty which was proposed for a violation of Section 50.7 was fully mitigated because of TVA's prompt corrective actions, which included investigation of the incident and action against the offending supervisor. And, in Commonwealth Edison Company, 92-212 (Byron Units 1 and 2), EA 92-019 (April 22, 1992),

no civil penalty was proposed in a case involving a violation of Section 50.7 because several years had passed since the violation occurred, and because of the apparent isolated nature of the violation.

In the present case, factors similar to these support an NRC exercise of discretion to take no enforcement action. First, although the Company concluded that [ ] had engaged in no intentional wrongdoing with respect to [

Second, NU is confident that it properly addressed the relevant safety issues pertaining to the FWCI system at Millstone Unit 1, and that the FWCI system was capable of performing its intended safety function. What is more, the incidents in question occurred almost four years ago. Since that time, the Company has taken several far-reaching steps to ensure a healthy work environment, including a broad management reorganization resulting in a shorter chain-of-command; enhancements to the Company's Nuclear Safety Concerns Program (NSCP); and the vigorous reinforcement of the message to NU employees that nuclear safety through operational excellence is the top priority of NU's nuclear program. All of these initiatives are directed at improving the

nuclear organization and enhancing the safety culture. NU believes these measures have been and will continue to be effective in promoting the proper atmosphere at all levels of the organization.

Finally, the Company recently received a Severity Level II violation, with a significant civil penalty, for a violation of Section 50.7 in the same time frame (EA 92-212). Lessons have been learned as a result of this experience, and management effectiveness in handling issues of this nature has been an area of focus and scrutiny. Increased management attention has been given recently in particular to fostering an atmosphere in which employees are encouraged to raise safety concerns. The significant management initiatives in this regard have been described in detail in recent correspondence with the Commission. See, e.g., June 3, 1993 letter from William B. Ellis to James Lieberman; October 21, 1993 letter from John F. Opeka to James Lieberman. In short, another civil penalty or other enforcement sanction imposed at this juncture would accomplish nothing further in the way of sending the regulatory message that discrimination in violation of Section 50.7 is a serious matter. The Company has already received and fully appreciates that message. Enforcement action in this case would serve no regulatory purpose.