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# OFFICIAL TRANSCRIPT OF PROCEEDINGS

**Agency:** Nuclear Regulatory Commission

**Title:** Public Meeting on Whistleblowers

**Docket No.**

**LOCATION:** Rockville, Maryland

**DATE:** Wednesday, August 25, 1993

**PAGES:** 1 - 124

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1 UNITED STATES OF AMERICA  
2 NUCLEAR REGULATORY COMMISSION  
3  
4 PUBLIC MEETING ON WHISTLEBLOWERS  
5

6 Nuclear Regulatory Commission  
7 One White Flint North  
8 Conference Room 1G16  
9 Rockville, Maryland  
10 Wednesday, August 25, 1993

11 The meeting convened, pursuant to notice, at 9:10  
12 a.m., James Lieberman, Director, Office of Enforcement,  
13 presiding.

14 NRC Attendees:

15 James Lieberman, Director, Office of Enforcement  
16 Ben Hayes, Director, Office of Investigations  
17 Brian Grimes, Director, Division of Operating  
18 Reactor Support, NRR  
19 John Greeves, Deputy Director for Facilities, NMSS  
20 Jon Johnson, Deputy Director, Division of Reactor  
21 Projects, Region II  
22 Jack Goldberg, Deputy Assistant General Counsel  
23 for Enforcement, OGC  
24  
25

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1 Attorneys:

2 Billie Pirner Garde, Hardy & Johns

3 Lynn Bernabei, Bernabei & Katz

4 David Colapinto, Kohn, Kohn & Colapinto

5 Richard Condit, Government Accountability Project

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## P R O C E E D I N G S

1  
2 MR. LIEBERMAN: Good morning. I'm Jim Lieberman,  
3 the Director of the NRC Office of Enforcement and the  
4 Chairman of the Review Team for Reassessment of the NRC  
5 program for protecting allegers against retaliation.

6 With me today from the Review Team, beginning on  
7 my left, is Jack Goldberg from the Office of General  
8 Counsel; Brian Grimes from the Office of Nuclear Reactor  
9 Regulation; Ben Hayes from the Office of Investigations.

10 On my right is John Greeves from the Office of  
11 Nuclear Material Safety and Safeguards and Jon Johnson from  
12 Region II.

13 The Review Team was formed at the direction of the  
14 Commission to consider whether NRC has taken sufficient  
15 steps to establish working environments within licensees'  
16 organizations where employees feel free to raise safety  
17 issues without fear of retaliation.

18 We published a Federal Register notice seeking  
19 public comments on this issue and copies are available on  
20 the table on the side.

21 This is the first public meeting of the Review  
22 Team. Today we will be meeting with attorneys who represent  
23 employees who have sought remedies pursuant to Section 211  
24 of the Energy Reorganization Act. Tomorrow we are meeting  
25 with attorneys who represent licensees.

1           We are also planning a series of public meetings  
2 in September and October in New London, Connecticut,  
3 Phoenix, Arizona, Bay City, Texas, and the Chattanooga,  
4 Tennessee area. These meetings are intended for the purpose  
5 of employees, licensees and other concerned individuals like  
6 yourselves to bring forth issues and ideas for our  
7 consideration. Our purpose is not to resolve specific cases  
8 but rather to gain ideas on how to improve the current  
9 regulatory system.

10           Let us begin by each of you introducing yourself.  
11 Dick...

12           MR. CONDIT: My name is Richard Condit. I'm an  
13 attorney with the Government Accountability Project.

14           MS. BERNABEI: I'm Lynn Bernabei with Bernabei &  
15 Katz.

16           MR. COLAPINTO: My name is David Colapinto,  
17 attorney with the law firm of Kohn, Kohn & Colapinto, also  
18 here on behalf of the National Whistleblower Center.

19           MR. LIEBERMAN: Thank you. I understand Billie  
20 Garde will be joining us in about an hour.

21           We welcome each of you today and appreciate your  
22 taking the time to meet with us. The issue before us is an  
23 important one. NRC, even with its many inspectors, can only  
24 observe a fraction of license activities. We'll never have  
25 the knowledge possessed by the thousands of employees in the

1 nuclear industry.

2 Employees of the nuclear industry have clearly  
3 made contributions to the public health and safety by coming  
4 forward with concerns. Employees must feel free to raise  
5 potential safety issues to the NRC. However, in the  
6 Commission's view, it is not enough for employees to feel  
7 free to come directly to the NRC. Licensees have the first  
8 responsibility for safety. Thus employees must also feel  
9 free to raise safety issues to their management.

10 We recognize that there is dissatisfaction with  
11 the current system. There are clearly licensees whose  
12 employees are not always comfortable in raising safety  
13 issues. I don't have to tell you that there are also  
14 employees who have been discriminated against for engaging  
15 in protected activities.

16 We are looking forward to your views on what  
17 actions NRC should consider to cause licensees to foster an  
18 atmosphere where individuals with potential safety concerns  
19 are encouraged to come forward with those concerns.

20 With that background, let us begin our discussion  
21 with each of you providing your presentations. We would  
22 appreciate it if you could keep it to about 15 minutes. We  
23 will try not to interrupt with questions except for  
24 clarification until you are each through with your  
25 presentations and then we will proceed to raise questions.

1 Richard.

2 MR. CONDIT: My name is Richard Condit. I'm an  
3 attorney with the Government Accountability Project, a  
4 nonprofit group based in Washington.

5 I would like to keep my comments brief and allow  
6 an opportunity for you all to ask questions. I think that  
7 might be the most productive way to proceed. So I do not  
8 intend to use up the 15 minutes you've allotted.

9 Essentially, you've asked the question, what can  
10 NRC do to create an atmosphere within licensees'  
11 organizations to encourage and protect workers who wish to  
12 disclose possible violations of NRC regulations or  
13 standards?

14 I think it's a good question. I'm glad that this  
15 committee has been assembled to review that issue. It has  
16 been an issue that has been needed to be more thoroughly  
17 addressed by the agency for sometime now.

18 I have a couple of points to make with respect to  
19 that issue, and then as I mentioned, I would prefer to wait  
20 and hear your questions.

21 I think, first of all, the agency must demonstrate  
22 quite publicly that it will be more aggressive about  
23 enforcement actions. It can do that in a number of ways.  
24 I'll tell you in a moment why I think that's important for  
25 the purposes of protecting whistleblowers and creating an



1 atmosphere conducive to them coming forward.

2 First, NRC must help workers to understand that  
3 speaking out to a manager or member of the NRC really means  
4 something. Our experience over the years has been that  
5 workers are very hesitant to come forward, and the reason  
6 they end up coming to organizations like ours is because  
7 they perceive the NRC, the site management and the site  
8 allegation management program, like Safe Team or Quality  
9 First, to all be hostile entities. They all perceive them  
10 to be essentially in the same camp and they don't see a  
11 distinction between the NRC and the folks who are running  
12 and operating the plant.

13 The reason is that every time something happens  
14 they see the agency first deferring to the utility to take  
15 some type of step or they see what appears in their mind to  
16 be pandering to the utility as opposed to being aggressive  
17 about enforcement.

18 So I think you need to create through demonstrated  
19 actions a public perception that translates to the work  
20 force that you mean business when you take an enforcement  
21 action and that it's not just the type of action that a  
22 utility can easily brush off financially. Fining a utility  
23 that makes mega millions of dollars \$80,000 for a violation  
24 is virtually meaningless. It doesn't do anything. And the  
25 workers know that. So they are caught in a bind, thinking,

1 well, okay, I'm going to come forward and what's going to  
2 happen? These guys are going get fined and I'm going to get  
3 screwed and it's going to hurt me more than it's going to  
4 hurt them. It's really that simple.

5           You need to increase your visibility and you need  
6 to show the public generally that you mean business on  
7 enforcement matters.

8           With respect to enforcement, I think you must  
9 heavily fine or disbar utilities for violations that are  
10 deliberate or occur due to obvious negligence. I think it  
11 would be a very serious enforcement action to take to  
12 restrict a utility from getting further NRC licenses or  
13 eliminating them from getting licenses at all. You really  
14 need to hit these folks where they live, which is in their  
15 pocketbooks. If you don't do something that is meaningful  
16 in that respect, then your enforcement is not meaningful and  
17 it's merely factored into the cost of doing business.

18           The NRC is not any different in that way than any  
19 other agency in the United States Government at this time,  
20 and various agencies have been making various efforts to  
21 improve in that area. The EPA has a disbarment program  
22 where, for instance, folks who deliberately falsify  
23 information with respect to contracting work done on  
24 laboratory analyses or things like that can be restricted  
25 from getting EPA contracts. You've got to do something with

1 that kind of teeth in it in order to show the work force and  
2 the public generally that it's worth their effort and their  
3 toil to come forward and confront a major utility or a major  
4 utility contractor.

5 Another bit of advice on enforcement is to hold  
6 managers personally accountable via fines, criminal charges,  
7 and/or disbarment from working on NRC licensed facilities.  
8 In our experience we found on many occasions that there are  
9 essentially bad guys on the site. I think Ben Hayes, who I  
10 am glad to see here, has done enough investigative work to  
11 know that that is true. I think that when you have bad  
12 apples in a project you need to sort them out and make sure  
13 that they can't practice anymore.

14 You need to make it clear to the utility that they  
15 make a choice between supporting a manager who has done  
16 something that is clearly wrong or being able to survive as  
17 an NRC licensee. With that choice in front of them, there  
18 are not going to be too many questions about which avenue  
19 they are going to take and you will quickly weed out the bad  
20 apples in the management unit.

21 Finally, with respect to aggressive enforcement, I  
22 think you should increase your enforcement capabilities by  
23 seeking legislative change in the Atomic Energy Act and the  
24 Energy Reorganization Act to permit citizen suits for  
25 violation of NRC regulations or standards.

1           I think citizen suits have been an effective  
2 mechanism in the environmental arena to allow citizens,  
3 which includes workers by definition, to take steps to come  
4 forward when the agency is incapable of taking steps and  
5 dealing with all the regulatory issues that might confront a  
6 particular site or licensee operation. It allows the  
7 citizenry, the workers, to take matters into their own  
8 hands, if you will. And of course it always gives the  
9 agency an option to step in. The way citizen suits are  
10 structured in the environmental arena is that there is a  
11 notice that has to be issued to the agency and to the  
12 affected party that allows about a 60-day period for some  
13 kind of remedial action to take place. If that doesn't  
14 happen, then the citizen has the option of taking the matter  
15 to court to have it adjudicated.

16           You could set this up in any number of ways. You  
17 could have it be court based; you could have it be NRC  
18 administrative based. And we'd be happy to work with you to  
19 give you ideas on how to structure such a thing.

20           I think that that would increase your enforcement  
21 capability and again show your seriousness about showing  
22 that your standards mean something, mean enough to you that  
23 if you're not able to get to them and if you don't have  
24 enough inspectors and other people to go around, then, by  
25 golly, you're going to let the people who are most affected

1 by a perceived violation take action on their own. It's  
2 very empowering for the work force; it's very empowering for  
3 the citizenry; and I'm sure it would be very threatening,  
4 unfortunately, to the utilities. So you'll get lot of  
5 resistance there, but I think it's a very meaningful program  
6 and it has been proven successful in the environmental  
7 arena.

8 With respect to current site programs that focus  
9 on employee allegation management, such as Safe Team and  
10 Quality First -- and I'll just speak about these, because I  
11 perceive this to be another big issue, and then I'll wait  
12 for your questions -- I think that the agency really needs  
13 to rectify a problem that exists with these types of  
14 organizations. Our experience in investigating Safe Teams  
15 in various places: Fermi, South Texas, Comanche Peak, and  
16 other places -- demonstrates essentially that these programs  
17 are designed merely to expose workers and worker allegations  
18 and they do so for the purposes of allowing management to  
19 get the heads-up, essentially.

20 They advertise themselves as being independent,  
21 which is a lie. They advertise themselves as preserving the  
22 confidentiality of the worker, which the worker believes  
23 means that management on the site will not get word of their  
24 information, which is also a lie. Because, as you all know,  
25 these Safe Teams have site management overseers, and even if

1 the perception is created that there is an independent  
2 trailer with independent workers who wear an independent  
3 uniform and get a check from Syndeco or some other  
4 organization, the fact of the matter is that these employee  
5 allegation management programs are very closely controlled  
6 by the site management and they have no problem getting into  
7 records; they have no problem ferreting out allegations;  
8 they have no problem learning the identity of workers.

9 On the other hand, when you do get a good Safe  
10 Team investigator, he or she is often stopped in their  
11 tracks by a site manager or a contractor because there is no  
12 requirement to comply with the Safe Team investigation.

13 So what you have is a fiction on the site, and  
14 eventually workers learn this, many of them the hard way, by  
15 seeing their colleagues essentially go down one by one and  
16 be led into the trailer to get a nice mug and a pep talk and  
17 then to find out later on that that employee has been  
18 transferred or whatever else. They put two and two together  
19 pretty quickly and they realize that management understands  
20 who made an allegation and what happened.

21 If you are going to have these management  
22 programs, you need to make them honest. The best way to  
23 make them honest is to require that all allegations that  
24 come to a Safe Team program or program like Safe Team be  
25 transferred also to the NRC. This would put the NRC on

1 notice of a concern. It would also potentially shield the  
2 employee in some way because the NRC would be advised that  
3 there is a concern and who is connected with the concern and  
4 if something suspicious should happen to that person, then  
5 the agency may be able to take enforcement action on its  
6 own.

7 In addition, you need to ensure that these  
8 programs mean something when they are doing investigations.  
9 Right now they are not required to comply with 10 CFR  
10 Appendix B in the way they handle allegations or the way  
11 they investigate them. Which is, from our point of view,  
12 really ridiculous, because essentially you have a two tier  
13 system. If I'm a worker and I go to Safe Team, I'll get one  
14 set of criteria that will be followed or not followed in  
15 pursuing my concern; if I went to the NRC, the NRC would  
16 insist on a 10 CFR 50 Appendix B analysis.

17 What does that mean for your enforcement  
18 mechanism? It means that you have a huge inconsistency and  
19 a huge gap in your ability to ensure that matters that are  
20 of equal importance are treated equally, because on the one  
21 hand you have a Safe Team or program like it that is able to  
22 do whatever it wants, and on the other hand if it goes to  
23 the NRC, it may be treated completely differently.

24 MR. GRIMES: Excuse me. Could you expand just a  
25 little bit on what you mean by an Appendix B evaluation?

1 MR. CONDIT: Appendix B, as you know, has a number  
2 of requirements in terms of quality assurance and quality  
3 control. If you don't require that Safe Team programs or  
4 other employee allegation management programs comply with  
5 those quality assurance and quality control provisions when  
6 they are investigating or pursuing an issue, which you  
7 currently do not -- the GAP litigated that issue with the  
8 NRC and the NRC took the position in court, and was  
9 successful, that it didn't have to require that Appendix B  
10 be applied to these programs -- if you don't do that, then  
11 you have a whole different set of standards of at the site  
12 level than you do if the NRC was investigating something,  
13 and that seems inconsistent with the NRC's effort to have  
14 management be as accountable as the agency would be itself  
15 for dealing with a particular problem.

16 Does that clarify that?

17 MR. GRIMES: Yes. I understand your concern, but  
18 I don't think the NRC formally follows an Appendix B program  
19 in investigating concerns.

20 MR. CONDIT: But in terms of a quality assurance  
21 or quality control issue, do you not require that if that's  
22 an issue that is being investigated that Appendix B criteria  
23 would apply?

24 MR. GRIMES: My impression is that we would apply  
25 the safety criteria that were applicable to the system, but



1 that wouldn't affect the investigation itself. I'm having  
2 trouble differentiating between the actual inquiry being  
3 conducted to certain standards and the standards against  
4 which you would measure that.

5 MR. CONDIT: I understand your question. It  
6 appears that I have skipped a step in explaining this, so  
7 I'll go back and explain the step.

8 Many concerns that come forward, at least in our  
9 experience, relate to the abdication of quality assurance  
10 and quality control programs. In some way or another  
11 quality assurance and quality control are implicated by a  
12 worker's concern. That has certainly been by and large our  
13 experience.

14 When you take that kind of matter to Safe Team,  
15 they are not concerned with what Appendix B requires in the  
16 way they handle, evaluate or ensure resolution of the  
17 concern. And I guess it's ensuring the resolution of the  
18 concern that we need to be focused on for the purposes of  
19 determining how Appendix B is applicable.

20 If you don't require Safe Team programs to live up  
21 to the requirements of Appendix B when evaluating the types  
22 of concerns that are applicable to an Appendix B standard,  
23 then what you have there, as I was trying to explain, are  
24 two tiers. You have the site based activity being able to  
25 get away with essentially a substandard evaluation and

1 correction of a problem where the NRC would take a much more  
2 firm position, I would hope, and apply its Appendix B  
3 criteria in evaluating a quality assurance or quality  
4 control issue and ensuring that it meets the standards of  
5 Appendix B.

6 MR. LIEBERMAN: When you are referring to Appendix  
7 B, you are referring to having procedures, having  
8 documentation, independence, and those aspects of Appendix  
9 B?

10 MR. CONDIT: Exactly. And our experience is that  
11 Safe Team doesn't pay any attention to that when they are  
12 evaluating a quality assurance/quality control problem.  
13 Appendix B, they virtually ignore it.

14 MR. GRIMES: Let me try it once more. I thought  
15 perhaps you were getting at the point of the Safe Team might  
16 look at the substance of the bottom line safety significance  
17 of the problem rather than the process that was or was not  
18 followed by the workers.

19 MR. CONDIT: I don't really wish to belabor this  
20 and I don't want to take up too much time. Perhaps the best  
21 way for me to deal with it would be for me to meet with you  
22 afterwards and just chat about it. Essentially the best way  
23 to explain this would be to take a specific type of concern  
24 and go through the steps that might be required in  
25 evaluating a quality assurance or quality control issue.

1 Our experience has been that Safe Team does not take those  
2 steps consistent with Appendix B and in investigating and  
3 so-called resolving the concern does not require that a  
4 quality assurance or quality control concern about  
5 documentation or any number of things that apply to a proper  
6 quality assurance/quality control program be lived up to.  
7 Hopefully that clarifies your question.

8 That's the end of my comments. I'll be happy to  
9 take questions at the end.

10 MR. LIEBERMAN: Lynn.

11 MS. BERNABEI: My name is Lynn Bernabei. I want  
12 to thank you for inviting a number of us here to speak today  
13 on this topic.

14 I think probably all the lawyers that are going to  
15 be speaking today through their comments will not really  
16 indicate what I think most of us and most of the  
17 whistleblowers feel, which is a very deep sense of cynicism  
18 and in some cases even desperation about what kind of  
19 protection the NRC is really going to provide to them.

20 From my viewpoint, there is a very long history of  
21 harassment at a lot of plants. In particular, a number of  
22 troubled plants in the country. The general perception of  
23 the workers and some of the managers that want to do their  
24 job right is that the NRC is not only not protecting them  
25 but in some cases identifying and targeting them for

1 retaliation by the utility. So in commenting on some of the  
2 suggestions that Chairman Selin and the Commission has  
3 proposed in the regulations, I don't think my remarks are  
4 really going to reflect the depth of the problem I think the  
5 Commission is facing.

6 I would like to make one comment, first of all, on  
7 the overall approach of the Commission as reflected in the  
8 regulations and also in some of Chairman Selin's remarks in  
9 the past.

10 The NRC seems to be drawing an artificial  
11 distinction between protecting the workers, which they say  
12 is the job of the Department of Labor, and creating an  
13 atmosphere free of harassment. It's a little bit like  
14 saying you want to protect school children from drunk  
15 drivers but you couldn't possibly punish or reprimand  
16 somebody who kills a school child while intoxicated.

17 If the Commission continues to hold onto this  
18 distinction that protecting the worker, saving his job,  
19 providing him physical security, protecting his identity is  
20 something that they are not interested in, they are never  
21 going to get any kind of true creation of a harassment free  
22 and discrimination free environment.

23 With regard to what seems to be sort of the  
24 centerpiece of the Commission's current approach to  
25 protecting workers, which is creation of these employee

1 concern programs, I echo some of Richard's concerns. With  
2 one large exception, the employee concern programs in the  
3 nuclear plants operate more as internal security programs.  
4 Whether you call them ombudsman programs, employee concern  
5 programs, Safe Team programs, what they really do is collect  
6 concerns, identify the people that are troublemakers and  
7 disclose them to management for retaliation. They are not  
8 widely respected by workers, but my feeling is that they get  
9 the respect they deserve. They don't serve as effective  
10 mechanisms for protecting workers or surfacing concerns, and  
11 so they are not trusted, but rightfully so.

12 I think the only way any kind of systematic  
13 imposition of employee concern programs could work is if the  
14 people that run the programs are essentially independent.  
15 By independent, I mean they don't report to the utility  
16 management or they report at a level above the vice  
17 president or manager of nuclear power, and that they also  
18 have a parallel reporting line to the NRC in some sense.

19 The one employee concern program that was  
20 effective was the Quality Technology Company, which was at  
21 Waterford, at Wolf Creek, and then finally faced its demise  
22 at the Tennessee Valley Authority. They essentially were  
23 fired because they were effective; they did gain the trust  
24 of workers at TVA that for years had been harassed; they did  
25 legitimate investigations of their concerns; they protected

1 their identities; and TVA essentially fired them and  
2 eventually the company went bankrupt.

3           There is a Department of Labor finding that in  
4 fact the highest levels of TVA management fired QTC for  
5 discriminatory reasons because it wanted them to stop  
6 finding and corroborating safety problems so they could  
7 restart their plants. What happened in that case again, I  
8 think, is indicative of the NRC's history in this area,  
9 which is after the finding of discrimination was found the  
10 Commission refused to do anything because, they said, it was  
11 too late; it took five years; the management is different;  
12 and we think that this has already been considered.

13           Essentially what you have is the one employee  
14 concern program that I'm familiar with that actually worked  
15 effectively. The contractor got fired and all the people  
16 that had put their faith in that contractor were similarly  
17 targeted for harassment after that.

18           So I think any serious attempt by the Commission  
19 to create an employee concern program that will really  
20 protect workers and not serve as some kind of internal  
21 security program has to be truly independent, and I think  
22 that means that it should be people from the outside or a  
23 company from the outside and it should have reporting lines  
24 that would make it truly independent.

25           The second thing I think that has to be done is if

1 the utility does not respect the independence of the  
2 contractor that is brought in to conduct the program, there  
3 has to be serious enforcement action by the NRC. What the  
4 industry learned from the Quality Technology Company  
5 experience is that the Commission will do nothing if an  
6 independent contractor that it pushed the utility to hire  
7 gets fired.

8 If the Commission continues either with imposition  
9 of a requirement of an employee concern program that is not  
10 independent or a failure to take enforcement action when the  
11 independence of such programs is threatened, I think what  
12 you are going to find is that there is going to be  
13 essentially another layer of bureaucracy that is not going  
14 to be protecting whistleblowers but is essentially going to  
15 be harassing them or another mechanism of harassment.

16 The question that is sort of asked in the  
17 regulations is, how can you create confidence in the  
18 programs? My sense is that the workers at nuclear plants,  
19 if anything, have too much confidence in the programs that  
20 exist, that they are so dedicated in many instances to  
21 wanting to make sure that the plants that they are working  
22 on are safe that they will, beyond what I consider rational,  
23 try to use these programs and go to the programs because  
24 it's the only thing available to them.

25 So again I think creating confidence is really

1 creating the reality of an independent program that really  
2 will try to protect the whistleblower and protect their  
3 safety concerns and not just create jobs for more unemployed  
4 nuclear contractors.

5           The other issue that seems to be of concern to the  
6 NRC throughout the proposed changes or the suggested changes  
7 is what organizational characteristics can encourage  
8 employees to come forward with safety concerns. I think  
9 it's pretty clear that this is the wrong way to look at the  
10 problem. The problem is really an economic problem. The  
11 nuclear utilities are businesses; they are trying to make  
12 money;; they are facing what they see as an increasingly  
13 difficult economic environment; they are not protected as  
14 they once were with automatic rate hikes; and so in order to  
15 sort of keep to their bottom line they really have to keep  
16 their workers in line, and that means suppressing safety  
17 problems.

18           Given that that is the only concern, as far as I  
19 can tell, of nuclear utilities, it seems to me that the  
20 Commission has to stop thinking about organizational  
21 characteristics and sort of the sociology of organizations  
22 and start thinking about deterrence. It's hardly a novel  
23 approach. It's what every other agency or law enforcement  
24 or government body does. They think about how can you deter  
25 people from undesirable behavior. In most cases the most



1 effective way to do that is through economic disincentives.

2 I think that has to be done at this point, given  
3 the problems in the industry, in a pretty severe and drastic  
4 way. Again, these are suggestions. I think there are many  
5 ways to handle this:

6 Some requirement in the tech specs or some kind of  
7 license requirements that a licensee demonstrate that it  
8 maintains a discrimination free environment.

9 You might have a requirement that there be no more  
10 than two or three DOL complaints filed per year, and if  
11 there are more, then the license would be suspended. Or  
12 there would be an order to show cause and they would have to  
13 come forward with evidence that they are maintaining some  
14 kind of discrimination free environment.

15 There are many ways to do it, but to put some  
16 actual license condition either through the license or  
17 through the tech specs on the licensee to maintain a  
18 discrimination free environment is what is done in other  
19 areas in terms of discrimination of a different sort, such  
20 as in the area of maintaining an environment free of race  
21 discrimination, sex discrimination, things of that sort.

22 MR. LIEBERMAN: Lynn, when you said, for example,  
23 no more than two DOL complaints a year, do you mean  
24 complaints or findings of discrimination?

25 MS. BERNABEI: I think you want to talk about

1 complaints. I think this approach has to be parallel with  
2 the NRC doing some investigation or some look into the  
3 complaints that are filed parallel with the Department of  
4 Labor. I think the Department of Labor, while its record is  
5 certainly better than the NRC's record on this issue, is  
6 very slow. It is an overworked agency.

7           The compliance officers are not expert in many  
8 cases in nuclear energy and the workings of the industry,  
9 and they are really not equipped to deal with the kinds of  
10 complaints that nuclear workers have of discrimination and  
11 harassment. There has been sort of a cadre of compliance  
12 officers who have gained expertise down in the Tennessee  
13 area since they have investigated probably hundreds of  
14 complaints at this point, but in most places in the country  
15 that doesn't exist. Most of the people at the Department of  
16 Labor investigate minimum wage problems, all kinds of other  
17 problems that have nothing to do with nuclear energy, and  
18 they simply don't have the kind of expertise the Commission  
19 does to investigate.

20           The alternative to that would be to fine the  
21 utilities in a way that really provides an economic  
22 disincentive to discriminate. I think you want to be  
23 talking about fines of \$1 million a day for every day they  
24 are found to discriminate. That's the same kind of economic  
25 incentive they have to discriminate, which is what it costs

1 to keep a plant down for a day. If they knew that the cost  
2 of discriminating would be that they couldn't operate the  
3 plants, the economic incentive would be to not discriminate  
4 rather than to discriminate as it currently exists.

5           Until there is sort of a reorientation of the  
6 Commission's thinking away from sort of what I think of as  
7 the sociology of organizations and more to the economic  
8 realities of the industry things are really not going to  
9 change.

10           The other issue that sort of infuses the NRC  
11 thinking on this is, what can the NRC do to protect  
12 employees? The issue always becomes, how can we investigate  
13 the safety concern if we can't disclose the person's  
14 identity or if we can't disclose information that would tend  
15 to focus on a particular problem that the employee has  
16 raised in the past?

17           I think the NRC should do essentially what any  
18 lawyer working in this area or in other areas does, any  
19 investigator does, any reporter does. You first of all  
20 protect your sources, because those are the people that are  
21 going to bring forth the information. If it means you  
22 forego a particular investigation for a certain period of  
23 time, that's what you do, because it's better to have the  
24 information and be able to try to deal with it in the future  
25 than not to have it, and those are the alternatives. I

1 think that even if it means that the NRC has to defer for  
2 some period of time an investigation, that is the cost of  
3 making sure that people come forward, protecting their  
4 identity and protecting them in their jobs, and that the top  
5 priority should be ensuring that the person is not  
6 jeopardized so that he and others will feel free to come  
7 forward and continue to report the information.

8           There are also, I think, many avenues open to the  
9 Commission that they refuse to acknowledge to get  
10 information without disclosing the identity of the person.  
11 There are inspectors; there are routine inspections; there  
12 are all kinds of ways that the Commission can get to  
13 licensee records without disclosing the person's identity.  
14 I don't think it would be too hard to do that if there were  
15 really a commitment to protecting workers' identities.

16           The flip side of this is that I think the NRC has  
17 to stop engaging in some of what I see as incredibly  
18 destructive activities toward whistleblowers. The sort of  
19 case that comes immediately to mind is what I think most of  
20 us think of, the NRC's vendetta against Steve Comley of We  
21 the People and Roger Fortuna.

22           In that case it has become increasingly clear, I  
23 think, to anybody in the industry and anybody that cares  
24 about the Seabrook plant that the Commission is not really  
25 interested in finding out information about the workers at

1 Seabrook. And they are not interested in putting Steve  
2 Comley in jail because he's hiding safety information. It's  
3 clear they don't want to do that. What they really want to  
4 do is frighten people from coming forward, and they have  
5 effectively done that.

6 It seems to me that unless there is an immediate  
7 stop put to what is clearly retaliatory actions against  
8 whistleblowers and their advocates such as is going on up in  
9 Massachusetts and New Hampshire there is not going to be a  
10 real sea change in the way that workers look at the NRC or  
11 at the sort of atmosphere of harassment.

12 There was one other point that was raised in the  
13 request for public comment, about whether or not the use of  
14 the deliberate misconduct rule would be a good way to  
15 proceed against nuclear managers that are suspected or  
16 alleged to have discriminated. My personal feeling is that  
17 this standard is too high, that the NRC either has or should  
18 get the statutory authority to apply a much lesser standard,  
19 including negligence or if someone negligently harasses  
20 someone because they don't know what their responsibilities  
21 are.

22 MR. HAYES: I'm sorry, Lynn. I missed that. I  
23 was making a note. Would you go back about 15 seconds and  
24 run that by me again?

25 MS. BERNABEI: My understanding is that there is

1 consideration by the Commission of using the deliberate  
2 misconduct rule as a possible handle to punish persons who  
3 are suspected of or alleged to have discriminated. My  
4 feeling is it's much too high a standard, that the NRC  
5 should demand more of the licensee if someone negligently  
6 harasses or discriminates against an employee. I think that  
7 should be the standard.

8           Having dealt for years with the bizarre litigation  
9 of material false statements, I think what you are going to  
10 do is just create a cottage industry for attorneys saying  
11 what really is deliberate misconduct, how high does the  
12 standard have to be. I think the agency has to have a  
13 lesser standard to meet just as in other areas of civil  
14 liability where someone can be suspended from government  
15 contracting even if they aren't found to have committed a  
16 criminal act.

17           I think that importing into the whole area of  
18 discrimination law the deliberate misconduct rule is going  
19 to be imposing essentially an impossible standard to meet,  
20 and I think we have seen that in terms of the historic  
21 fights within the Commission over material false statements  
22 and now the abandonment of any effort to find that licensees  
23 lie to the Commission.

24           Those are my comments. I would also like to echo  
25 that I certainly agree with everything that Richard said. I

1 would just urge the Commission to realize the depth of the  
2 problem and that it is much worse than what our sort of  
3 courteous interchange might lead you to think.

4 MR. LIEBERMAN: Thank you, Lynn. I don't doubt  
5 your last remark.

6 David.

7 MR. COLAPINTO: Thank you, Mr. Lieberman and good  
8 morning. I want to thank you for inviting us today. I  
9 think that this is probably something that is long overdue.  
10 I know that there are a lot of whistleblowers out in the  
11 country who are looking for some meaningful reform to come  
12 out of this process. I know that attorneys who work in the  
13 field have desired a lot of reform in the process as well.  
14 It certainly has not worked.

15 Some of those concerns have been aired in other  
16 forums and in the news media, on Capitol Hill, and even  
17 before the Commission in other cases and at other times. I  
18 think it would be helpful that whatever the results are of  
19 this process in terms of reform and new procedures or  
20 regulations taking place that we probably should come back  
21 and revisit this issue in the future, perhaps a year or two  
22 down the road, to see how the proposed changes are really  
23 taking effect.

24 I know you are going to hear a different point of  
25 view tomorrow and you are going to get a different picture

1 painted as to who whistleblowers are, what the scope of the  
2 problem is. My perception in dealing with utility attorneys  
3 is that the licensees generally view whistleblower actions  
4 as harassment suits, frivolous actions, crybabies. Attack  
5 the whistleblower: it's all in the person's mind; it's not  
6 as serious as they claim it to be; exploit whatever personal  
7 flaws the individual may have in order to discredit the  
8 individual. Those are the types of tactics that have been  
9 used out there, just to name a couple.

10 It is a wide problem. It is a lot more serious  
11 than I think we'll even be able to touch upon in our  
12 comments today, and I share those viewpoints that have been  
13 expressed by Lynn and Richard earlier.

14 I have several things that I want to mention with  
15 respect to suggestions as to ways in which the process can  
16 be improved, and also subjects for discussion.

17 The first problems that a whistleblower faces in  
18 communicating with the NRC is that he or she is immediately  
19 imposed upon by the Commission to give testimony either  
20 before the Staff or the Office of Investigations. It's an  
21 unfamiliar process to most citizens. It's a process in  
22 which many of these individuals are unrepresented.

23 The individual, who is doing a good deed and in  
24 many cases naive, picks up the telephone, contacts the NRC  
25 with a safety concern because he or she is frustrated that



1 his or her management has not been able to address the  
2 problem, and the NRC comes in with a battery of experts or  
3 investigators and says, Whistleblower X, please tell us  
4 everything you know. Sometimes they won't even tell you  
5 that you have the right to confidentiality. On other  
6 occasions when you are told that you do have the right to  
7 confidentiality, in extraordinary cases it is not going to  
8 be enforced. It can be unilaterally revoked, and it's a  
9 major perception problem from the beginning.

10 I think that you've got a trust problem at the  
11 beginning in your first contact with the whistleblower when  
12 you cannot even guarantee the confidentiality or at least  
13 that the individual has a right to pursue enforcement of  
14 that confidentiality if the NRC breaches the  
15 confidentiality.

16 Obviously if the identity of the whistleblower  
17 becomes known through other means, that's a different story  
18 altogether, but confidentiality is something that should be  
19 strengthened, and those procedures have to be reformed.

20 The second point is with respect to Department of  
21 Labor litigation. The Office of Investigations often does  
22 do some background investigations into harassment  
23 allegations and also some of the underlying safety problems  
24 and wrongdoing allegations. And the NRC collects a lot of  
25 information.

1           The problem the whistleblower faces in his or her  
2 litigation before the Department of Labor is obtaining  
3 access to that information in a timely manner. The Freedom  
4 of Information Act simply doesn't work in that context. We  
5 are faced with exemptions under 7(a) for law enforcement  
6 proceedings. We can never get access to any of the raw data  
7 or any of the information that has even been told by the  
8 licensee to the Commission about the events concerning the  
9 whistleblower's case or the whistleblower's allegations.  
10 It's a terrible process. There has to be a way in which to  
11 share that information earlier in the process and there has  
12 to be a way to do that without compromising the law  
13 enforcement purpose of the NRC, obviously, but something has  
14 to be done in that respect.

15           There are reports sometimes written by the Office  
16 of Investigations and in some cases the Inspector General  
17 when they do certain matters that address the very issues  
18 that are going to be litigated in the Department of Labor  
19 litigation. The utility will put on evidence to try and  
20 refute the whistleblower's position and there may be  
21 evidence within the report or the NRC file that refutes the  
22 utility's claim, but the whistleblower will never see it.  
23 It may be years later, after the Department of Labor  
24 litigation is over, placing the whistleblower litigant in  
25 the position of having to seek reopening of the record

1 before the Department of Labor, which is nearly impossible  
2 to do.

3 There should be a requirement of licensees in the  
4 enforcement phase, in enforcement proceedings before the  
5 Commission to mitigate wrongdoing against whistleblowers.  
6 It is simply inexcusable to permit licensees to get away  
7 scot-free after there have been findings on the record  
8 before the Department of Labor or the NRC of wrongdoing.  
9 And it has happened. It shouldn't happen.

10 The other problem that exists with respect to  
11 mitigation is that there is often an attitude which is built  
12 up in these litigations by the utilities of trying to  
13 prosecute the whistleblower, trying to throw the person in  
14 jail in some instances, discredit the person, throw them  
15 into poverty, including psychological warfare in some  
16 instances where there is harassment on a daily basis on the  
17 job. These types of tactics have to be stopped and they can  
18 be stopped, but the NRC is going to have to require the  
19 utility to prove that they have mitigated that harm, the  
20 discrimination against the whistleblower.

21 If there is a hostile work environment that is  
22 proven to exist in a particular case, what steps has the  
23 utility taken to stop that environment? We often don't  
24 know. We often get letters back from licensees saying that,  
25 oh, well, we have hired this contractor to come in and give

1 a little seminar to treat people better. That's not going  
2 to solve the problem. There have to be more concrete  
3 remedies available to stop that type of harm, not only to  
4 the whistleblower who is complaining, but also the other  
5 employees who are afraid to come forward.

6 This is a business where I think any attorney who  
7 has litigated these cases can tell you horror stories about  
8 shivering witnesses, people who are afraid to come forward  
9 for their friends, their colleagues, people they have had  
10 longstanding relationships with at work, out of fear that  
11 they would be next on the list. That has to be taken into  
12 account, and I think mitigating the wrongdoing is something  
13 that would go to correct that.

14 The next thing I think the Commission should  
15 consider is treating attorneys for licensees like any other  
16 licensee contractor. In many instances utility law firms  
17 have a very longstanding relationship and in fact in some  
18 cases a revolving door relationship with the managements of  
19 these licensees.

20 What we have in some instances is utility  
21 managements hiding behind the attorney-client privilege,  
22 calling an attorney who is on retainer from a law firm to  
23 come in and sit in on a meeting where certain matters are  
24 discussed. Then when you try to get that information, they  
25 claim attorney-client privilege and you can't get it. This

1 is completely unacceptable. I think there are ways to deal  
2 with this problem. I think that other agencies are dealing  
3 with it. If we look at some of the S&L cases where that  
4 issue has been litigated and some of the SEC cases, the  
5 attorney-client privilege is being pierced in other  
6 contexts, and I think that it should be looked at here.  
7 It's a big problem and I think it is something that should  
8 be addressed.

9           With respect to civil penalties and other  
10 enforcement actions, they obviously need to be strengthened.  
11 The current system doesn't work. It doesn't deter anybody.  
12 You can talk about raising the fine to \$1 million a day.  
13 That would be good. You could raise it to \$10 million a  
14 day. I'm not sure that that would deter some in the  
15 industry who are harassing people.

16           You definitely should look to revocation of  
17 license as a mechanism. Obviously that is not something  
18 that you are going use in every case but it's something that  
19 you should have available and use or threaten to use in  
20 appropriate cases. There are certain plants out there where  
21 that should be done, where there are repeat violations, and  
22 it's a ridiculous system right now. It takes too long. The  
23 fines are too low.

24           I think that some of the recent 2.206 petitions  
25 that have been filed by whistleblowers is the beginning of a

1 step in that direction where the Commission has actually  
2 taken a position with respect to the discrimination in  
3 response to a 2.206 petition.

4 I think the Commission should also look at  
5 instituting show cause proceedings. They do have that tool  
6 available today without having to reform anything, and it is  
7 something that should have been implemented at Palo Verde,  
8 in my opinion; it is something that should be looked at in  
9 South Texas.

10 There is currently an agreement between the NRC  
11 and the Tennessee Valley Authority IG to defer NRC action or  
12 to refer NRC inspection activities to the TVA IG. That  
13 agreement and understanding should be abolished. What is  
14 occurring there is the identification of whistleblowers to  
15 TVA management. The TVA IG reports directly to the TVA  
16 board. It doesn't protect the identity of anybody. In  
17 fact, it merely does the investigation for the TVA attorneys  
18 and the TVA contractor attorneys. It is riddled with  
19 scandal, and that should be abolished.

20 With respect to employee concern programs, if I  
21 can back up a minute to the TVA IG problem, giving the name  
22 of a whistleblower and giving the TVA IG the authority to go  
23 in and investigate the whistleblower's allegations is like  
24 giving the name and that authority to these employee concern  
25 programs. It's an arm of management. These employee

1 concern programs are arms of management and they should be  
2 recognized as such. They are not independent. It is my  
3 opinion and it is our opinion that they will never be  
4 independent.

5           There should be no misconception put out there by  
6 the NRC to employees that there will ever be a third party  
7 that will be able to investigate these concerns. There is  
8 no such thing as an ombudsman program that would work, in my  
9 opinion. It has been too riddled with problems with respect  
10 to identifying people, covering up. Every case that I'm  
11 aware of in which these employee concern things have been an  
12 issue in a whistleblower case the utility has used it  
13 against the whistleblower. You are damned if you do and you  
14 are damned if you don't in some cases. They try to use it  
15 to discredit you for not going there, and then when you do  
16 you face all kinds of horrors, like having your identity  
17 revealed.

18           The same is true for witnesses in these cases. It  
19 has come out in DOL proceedings from witnesses who have  
20 testified to their own horrible experiences with these  
21 programs. They report to management. And that's what they  
22 are.

23           The other problem with those programs is that they  
24 also report directly to the company attorneys and they are  
25 used as a means of discovery of what the whistleblower's

1 concerns are even before the whistleblower has an idea to  
2 file a lawsuit. They are used to identify and root out  
3 these people who may cause the company problems down the  
4 road. We've seen it at Palo Verde; we've seen it at Georgia  
5 Power where the reports written by the employees concerns or  
6 quality first or whatever they call them are sent directly  
7 to the company attorneys and in some instances directly to  
8 management.

9 Before the NRC sanctions any use of these programs  
10 on an official level, I think they really should be audited  
11 by the NRC and you should really look into what types of  
12 practices are going on out there before you sanction that as  
13 an alternative. You certainly should not rely upon these  
14 programs as a means of solving the problem.

15 They may serve some useful purpose. Maybe there  
16 is someone out there who finds them a valuable place to go  
17 to air their concerns and that person doesn't want to pursue  
18 the concern beyond that point and does not want to go  
19 outside the company. That's an individual choice, and it  
20 may have that valid purpose. But if that is all it is,  
21 that's what it should remain. It should not become  
22 something more.

23 Finally, I believe that the NRC should take action  
24 by NRC order to abate violations. There needs to be a  
25 requirement by the NRC that licensees take action to abate



1 the violation that has occurred. There are some cases that  
2 fall through the litigation cracks of the Department of  
3 Labor where a complaint is dismissed on a technicality, did  
4 not meet the statute of limitations. Yet there is a finding  
5 that perhaps there was discrimination or a judge may even  
6 make a finding there was discrimination but cannot hold that  
7 utility liable under the Department of Labor regulations  
8 because the complaint was untimely.

9           The Vera English case is a very good example. In  
10 that case there was a finding of discrimination. There was  
11 even an OI report written that vindicated the whistleblower  
12 and the utility was fined. But the harassment and the  
13 effects of the discrimination were never abated.

14           Mrs. English ended up litigating the case, never  
15 being successful in litigation due to certain  
16 technicalities, being driven into poverty, having to pay  
17 attorneys, and never getting here job back, losing a ton of  
18 money.

19           That in and of itself has a chilling effect on  
20 other workers. If a worker goes through that process, a  
21 very long process, loses his or her house, is unsuccessful  
22 because of technicalities, and everyone knows there was  
23 discrimination, there must be stronger action taken by the  
24 NRC to require that discrimination to be abated.

25           That's all I have at this time. I'm willing to

1 discuss these things at greater length, as I'm sure everyone  
2 else is.

3 Thank you.

4 MR. LIEBERMAN: Thank you, David.

5 Let me start with some questions. It's clear that  
6 each of you have questions concerning the effectiveness of  
7 employee concern programs and you have noted your concerns  
8 about them. I think Richard suggested that when a person  
9 makes a complaint or raises a concern with the company that  
10 somehow NRC be notified of the concern of the individual so  
11 either we can follow up or keep track, and if something  
12 happens to the individual, we can pursue that.

13 I'm wondering whether Lynn and David have any  
14 views on that.

15 MS. BERNABEI: I think it's a good idea but I  
16 certainly don't think it's sufficient. I think you have to  
17 sort of go back to the structure of the program and how the  
18 program is going to be structured. I think that any  
19 imposition of this requirement on licensees is going to be  
20 worse than what exists now unless the employee concern  
21 programs are truly independent. Otherwise they are going to  
22 continue to operate the way they do as internal security  
23 programs.

24 In terms of what David was saying, at someplace  
25 like TVA the employee concern programs actually come out

1 against the whistleblowers. There are investigators in that  
2 program that come to testify at Department of Labor hearings  
3 against the whistleblower because they've investigated their  
4 concern. They are not neutral. They are actually harmful  
5 to whistleblowers.

6 I think you have to go back to first principles as  
7 to how you are going to structure, and if you don't  
8 structure it in the right way and a substantially different  
9 way than the programs that exist now, it's going to be worse  
10 imposing that kind of a requirement than doing nothing.

11 MR. LIEBERMAN: David, do you have any thoughts on  
12 that?

13 MR. COLAPINTO: I'd have to echo what Lynn is  
14 saying. You've got tremendous involvement between the  
15 utility and these programs. I think if they do become a  
16 condition of license, that does have certain benefits if the  
17 employee is going to have access to that information. Right  
18 now we can't get that information oftentimes in civil  
19 discovery. If you are going to license it, you are going to  
20 to have to have the utility share that information during  
21 the civil discovery process.

22 I think you are opening up a real, real hornets  
23 nest. If you think you've got wrongdoing and harassment  
24 concerns now, there's a hotbed of places and people have  
25 resigned from these organizations because they've refused to

1 carry out the orders by their superiors to harass people,  
2 and in some cases they have gone out and harassed people.

3 MR. LIEBERMAN: The question that I am asking is  
4 the concept of when an employee goes to the company with a  
5 concern, whether they have an employee concern program or  
6 whatever technique they have for employees to raise issues  
7 outside the normal system, giving a copy of that concern to  
8 NRC. I asked the question because another facet of this  
9 issue is people come to NRC with concerns about the  
10 potential for harassment and intimidation. They haven't  
11 said they've been harassed yet or discriminated against.  
12 They are concerned about coming to the NRC or raising the  
13 issue to the company at all because of this fear.

14 How should we respond to that? Should we let the  
15 licensee know there is that concern? Should we let the  
16 licensee know that in a particular department there is that  
17 concern? Should we let the licensee know a particular  
18 individual has that concern and we're going to be watching  
19 what happens and how the licensee treats that person?

20 MR. COLAPINTO: When you say the NRC is going to  
21 be watching, on one hand it would be good. I think that the  
22 utilities should be required to self-report when they get  
23 significant safety concerns from employees in the first  
24 place. You shouldn't just put that out there if it's not  
25 going to happen or if there is not going to be some type of

1 follow-up. I'm a little dubious about the effect that that  
2 would have.

3 MS. BERNABEI: I think the premise to your  
4 question is wrong. You are sort of asking us to answer the  
5 question in the abstract. Answering it in the abstract, if  
6 you don't have a system that is set up or a system that you  
7 know about, I think telling a utility there is a concern in  
8 a department about harassment is going to be bad, because  
9 they are going to retaliate against the people in that  
10 department, and they know that currently the NRC has no  
11 effective enforcement action to protect the whistleblower.  
12 So I think in the current system that would be bad.

13 The answer to your question is really dependent on  
14 the overall system, if any, that is developed by the  
15 Commission. In the current climate with the current lack of  
16 enforcement on almost any front having that kind of  
17 reporting to the NRC and having the NRC take the kinds of  
18 actions you are talking about would actually harm the  
19 whistleblowers, in my opinion.

20 We are struggling to answer the question, but you  
21 have to answer the question in the context of the system  
22 that is set up to either protect or not protect the  
23 whistleblowers, and in the current system I think it would  
24 be very harmful to people to have that kind of reporting  
25 mechanism that the NRC then uses to expose the people who

1 reported it.

2 MR. CONDIT: I agree with what both Lynn and David  
3 said. I would also add, though, that I think that the NRC  
4 has to become a user friendly institution for workers. The  
5 way GAP and I'm sure many others would work with the worker  
6 is to abide by their own sort of internal concerns about how  
7 and when to do things.

8 If a worker comes to our organization, for  
9 instance, as Lynn was speaking to earlier, you often will  
10 not necessarily come forward; we won't necessarily report to  
11 the NRC because they are not ready. You have to consult  
12 with them in detail and understand the dynamics of their  
13 situation and what they have at stake. If they develop  
14 confidence in you, then they will be interested in you  
15 proceeding forward, but if you just take the information and  
16 take it as abstract and then charge forward without really  
17 paying much attention to the individual's needs, that's how  
18 you lose people and that's how you absolutely destroy  
19 confidence in any ability to recruit people or for people to  
20 come to you as a safe haven.

21 Unless the NRC has a commitment to creating a  
22 department or a component of the agency that is a true safe  
23 haven for individuals, you are not going to have the type of  
24 enforcement success you could have by recruiting the amounts  
25 and quality of information you could recruit from the work

1 force, as you realize you could from your own Federal  
2 Register notice.

3 I agree with what Lynn is saying, but that would  
4 be my amplification on that response.

5 MR. LIEBERMAN: Jon.

6 MR. JOHNSON: Richard, I don't understand your  
7 point. It sounds like you are saying that we should wait to  
8 pursue issues in order to protect the individual's identity.  
9 What about the underlying issue in the beginning, the  
10 technical problem that the individual has raised? We feel a  
11 need to look into those promptly to make sure they are  
12 resolved. How would you suggest we somehow hold off to  
13 protect the individual but then address the safety of the  
14 plant?

15 MR. CONDIT: I'm simply saying that it's a case by  
16 case analysis.

17 MS. BERNABEI: And there are many other ways to  
18 get that information confirmed and do something about the  
19 safety problem. You have inspectors at all the plants. You  
20 could wait a week and then go in and look at the records in  
21 a routine inspection or in some way that can protect the  
22 worker. There are many, many ways that the NRC simply never  
23 uses that you could protect the worker and still get to the  
24 underlying safety problems.

25 MR. JOHNSON: We try to do that now, but I'm sure

1 we could probably do better in the way we follow up on some  
2 of these technical issues by training our inspectors.

3 I was a little confused about the waiting aspect.

4 MS. BERNABEI: I would really disagree. At TVA  
5 currently the resident inspectors are telling employees  
6 there is no way we can protect you. They are affirmatively  
7 telling people not to come to them if they feel they need  
8 their confidentiality protected. So they are affirmatively  
9 telling them there is no way we will protect your  
10 confidentiality. I'm not sure that that is unique in the  
11 industry. So I don't think there is any significant attempt  
12 except perhaps on the part of individual inspectors or  
13 investigators to protect employees' confidentiality.

14 I think a lot of the kind of concern you are  
15 expressing -- How are we going to look at the safety problem  
16 and still maintain confidentiality? -- is really sort of a  
17 straw man to a large extent. That is sort of why the NRC  
18 has continuously said we have to go in there and disclose  
19 people's identity and get to the root of the problem.

20 In most of the cases where they have disclosed  
21 people's identity they haven't gotten to the root of the  
22 problem; they haven't looked at the safety issue.

23 What you find in all of these plants is the  
24 whistleblowers come forward to the point at which they are  
25 jeopardizing their job when this has been a long recurring



1 problem. I know at TVA none of these problems are new.  
2 They've existed for the last 15 years. So it's not like  
3 they have a hidden safety problem and people are coming  
4 forward with something that is all of a sudden a hazard to  
5 the public health and safety. These are longstanding  
6 problems that finally pushed somebody to the fore where they  
7 are going to come to the NRC. If you wait a couple days to  
8 protect the individual, I don't think the information is  
9 going to disappear; there is going to be a terrifically  
10 greater safety problem than if you don't wait a few days.

11 MR. LIEBERMAN: Billie Garde has joined us.  
12 Richard, Lynn and David have provided their presentation and  
13 we just started to get into questions concerning their  
14 presentations. If you could now give us your presentation,  
15 then we will pick up with the rest of the questions.

16 MS. GARDE: Let me give you an abbreviated  
17 presentation. I apologize for being late. I'm kind of in  
18 the middle of depositions on another case and had to get  
19 someone else to cover for me this morning.

20 I think that essentially, if I had to guess, my  
21 colleagues' presentations have been pretty much in line with  
22 the positions that I've taken.

23 You asked the question on whether the NRC has  
24 taken sufficient steps within its authority to create an  
25 atmosphere within the regulated community where individuals

1 with safety concerns feel free to engage in protected  
2 activities without fear of retaliation. I think the short  
3 answer that I'm sure you've probably heard is, no, that has  
4 not taken place; the NRC has not taken sufficient steps; and  
5 based on my experience with the clients that I've litigated  
6 on behalf of in the plants that I have had experiences with,  
7 employees do not feel free to come forward to the NRC or to  
8 their own management with concerns.

9 I hear echoed already the points that I think I  
10 was going to make, which is that the regulatory scheme as  
11 implemented provides no protection for workers. There just  
12 is no protection for workers in the concept of the NRC's  
13 activities.

14 If you as an agency are operating under a belief  
15 that in the field there is protection, you should dissuade  
16 yourself of that notion, because it does not exist. In the  
17 real world of workers deciding whether or not to blow the  
18 whistle, whether or not to go to the NRC, the press, GAP, or  
19 do nothing, which is, I think, the biggest fear for all of  
20 us, I think that the concept that there are protections  
21 available to them from the government is not there.

22 I think that that is well founded belief based on,  
23 from my own personal experience, a decade of either  
24 inactivity or such late activity and delayed activity on  
25 behalf of the NRC. I believe the NRC must operate on the

1 premise that a chilling effect exists on all sites with all  
2 plants and with all employees almost as a legal presumption.  
3 You must presume, as I think we do, that when a worker has  
4 to turn to some system outside of the plant, outside of the  
5 NRC, that the systems within the facility or the utility are  
6 not working; they are not available; and to aggressively  
7 analyze every whistleblowing situation from a broad  
8 perspective, not from the perspective that, well, we'll wait  
9 and see if some administrative law judge finds and a  
10 Secretary of Labor five years later holds that this  
11 particular individual whistleblower somehow managed to get  
12 through the eye of the needle with the kind of legal  
13 problems that are inherent with the Department of Labor  
14 system and instead look at that individual whistleblowing  
15 situation to determine what were the dynamics that existed  
16 at that time and at that place to create a situation in  
17 which that individual felt the need to risk his entire  
18 career, risk being terminated, in order to bring safety  
19 concerns.

20 I think when you look at those situations from  
21 that perspective you see a whole host of chilling effect  
22 issues that are far beyond the individual decision of  
23 usually a midlevel manager supported by upper management to  
24 let somebody go. I think the problems are very broad.

25 I'm sure the questions that you directed us to

1 answer in terms of the Department of Labor process have also  
2 been adequately addressed by my colleagues. It's a process  
3 that is at best worthless and really, in my opinion, is  
4 dangerous. It holds out the hope that there is some  
5 remedial relief, that there is some justice system that will  
6 provide protection and a remedy and somehow or another  
7 vindicate a whistleblower. The chances that that happens  
8 are so minuscule that it's very difficult to tell clients  
9 you've got a shot at this.

10 In my experience, the only time that those  
11 situations have worked is when there has been, for one  
12 reason or another, some cooperative effort between usually  
13 an individual NRC inspector and the whistleblower who have  
14 formed some sort of professional, personal bond and respect  
15 that that NRC inspector is willing to risk his own agenda,  
16 his own requirement to not have anything to do with  
17 whistleblowers and risk his own management's ire and take  
18 some steps to write strong inspection reports, to respond  
19 honestly to Freedom of Information Act requests, to ask the  
20 right questions of the right people within the utilities.  
21 And that is a very rare occasion. That, unfortunately, is  
22 not very frequent. What you usually have a great majority  
23 of the time has been that the NRC is part of the problem,  
24 not part of the solution.

25 I think another main problem is that Department of

1 Labor investigators are inadequately trained to recognize  
2 the significance of problems within the nuclear industry and  
3 that since the NRC takes a hands-off approach and almost has  
4 a very clinical approach to dividing up things into  
5 technical problems, people problems, discrimination  
6 problems, that there is not a broad picture approach. No  
7 one is sitting down and looking at a complaint for the big  
8 picture. They are only looking at it for ways you can put  
9 things in little pigeonholes and avoid it.

10 Frequently when I have a case that involves a lot  
11 of NRC activity I spend most of my time keeping the broad  
12 picture together, because it's very easy to say that's on  
13 their plate, that's on somebody else's plate, that's on  
14 another agency's plate. What gets lost in the process is  
15 that you've got a plant that's out of control; you've got a  
16 department that's out of control; you've got a midlevel  
17 manager that is a proven harasser that management has lined  
18 up behind in support of, and that all seems to fall through  
19 the cracks.

20 At Comanche Peak the problems that occurred there  
21 in the early 1980s largely came from the NRC refusing to  
22 lift a finger in the face of a management team that probably  
23 caused the \$6.5 billion that was spent on rebuilding the  
24 plant. I think that could have been eliminated if the NRC  
25 would have taken effective action in the early 1980s to deal

1 with about three supervisors. As most of you know, I spent  
2 a great deal of time at that plant analyzing what was  
3 happening and why it happened, and I am pretty confident  
4 that that is exactly what happened.

5 Some of the other questions that you asked us to  
6 address that I've taken a few notes on are when the  
7 Department of Labor investigation does find or an ALJ does  
8 find discrimination the NRC still does not take any action.  
9 It would seem to me that at a minimum if a Department of  
10 Labor investigator finds in the favor of the whistleblower  
11 that you should then begin to act on the presumption that  
12 what has occurred is discrimination and not wait for the  
13 process. Because what you've done is essentially funded the  
14 retirement of several major law firms in Washington, D.C.,  
15 to keep these cases going for at least five to six years,  
16 and it has been very effective.

17 Law firms representing utilities have made massive  
18 amounts of money keeping these cases tied up. They've been  
19 very successful at it, and they have been very successful at  
20 it, unfortunately, to the detriment of the public. They may  
21 have done their clients a big service, but they haven't done  
22 any of the rest of us any good at all. They may take the  
23 position that that has been very important because in an  
24 individual case they may not be able to prove  
25 discrimination, but it's a far bigger picture than that.

1 MR. LIEBERMAN: So you are suggesting that on the  
2 basis of the area office finding that we should initiate our  
3 enforcement actions?

4 MS. GARDE: Your whole process, in my opinion, has  
5 to be re-looked at. I think that you just build in a  
6 certain number of presumptions and premises which you do not  
7 operate under. If you are not willing to operate under  
8 changing those presumptions, then I'm not sure how you are  
9 going to fix the system, if it can be fixed.

10 In my opinion, you must start with the premise  
11 that there is a chilling effect at every nuclear plant in  
12 this country and that just inherent in the way this industry  
13 works and the way this industry exists that there has been  
14 enough bad experiences, bad press problems for a decade that  
15 you've got a work force that has survived the construction  
16 of all these facilities and has learned a very bad lesson,  
17 and that is, if you open your mouth, you're out of here and  
18 there are plenty more unemployed nuclear workers to take  
19 your place. So what you've got is an entire work force  
20 across the country that has been schooled to keep their  
21 mouth shut and has all of the incentive to keep their mouth  
22 shut.

23 If you start with the premise that that does not  
24 exist, that every work place does not have a chilling effect  
25 and the burden is on an individual whistleblower and maybe

1 his attorney to prove that, you're never going to change the  
2 system, because the utilities are going continue to try to  
3 operate under that premise.

4 The second presumption is that a wait and see  
5 approach, that is, whether or not an individual case of  
6 discrimination can be proved and upheld all the way through  
7 the courts before some enforcement action is taken, is  
8 incredibly dangerous. When we did the Bill Ross stuff at  
9 Duke Power Company it took you years to get that enforcement  
10 action out because the industry's position was that if they  
11 didn't have a Department of Labor complaint they couldn't  
12 even have a problem. I know that was a big fight back then,  
13 and you are very much further than you were then. But even  
14 that caused a great delay.

15 One of the other things that I wanted to point out  
16 in my statement, and I'll assume that everybody else raised  
17 the same ones that I did, is that the Commission issued the  
18 policy statement on the free flow of information to the  
19 Commission following the Macktall-Comanche Peak settlement  
20 flack. Since that time -- and Mr. Lieberman and Mr. Hayes  
21 are aware of this -- I've been engaged in a case which is  
22 ongoing in which that same problem has come up in the  
23 context of Department of Labor litigation, in which the same  
24 law firm is imposing a gag order on materials in discovery.  
25 That problem is being interpreted to exclude and only apply



1 to settlements.

2 I've raised that problem to both of you. You're  
3 aware of that. I think that in the context of this  
4 discussion on the process it's important that you as a panel  
5 understand that within the context of these cases, when you  
6 are in litigation in the Department of Labor, the real  
7 issues that are going on in this litigation is the utilities  
8 are trying to keep workers, their lawyers and the NRC from  
9 finding out the true extent of what is going on at that  
10 facility. As long as they can force you to do that and  
11 litigate under some type of seal, under some type of gag  
12 order, get the judge to put essentially the entire case  
13 under a gag order, you've denied the NRC and the public the  
14 ability to know what is going on.

15 I think the case that I'm working on is setting a  
16 very, very dangerous precedent for turning Department of  
17 Labor litigation into essentially private mediation in which  
18 the utility controls the whole setting.

19 MR. LIEBERMAN: Can licensees ever have a  
20 legitimate concern to protect the identity of people they  
21 may interview during their investigations to get information  
22 to make appropriate decisions? Just like we were talking  
23 earlier about NRC doing a better job in protecting the  
24 identity of people who might come to us.

25 MS. GARDE: If you are asking me if in the context

1 of discovery do I think a utility that is trying to maintain  
2 a viable and valid employee concern program has a right to  
3 raise that as an issue, yes, I think they have a right to  
4 raise that as an issue. I do not think they have a right to  
5 insist an entire litigation be kept under seal and the NRC  
6 be prevented from knowing that when there are other  
7 alternatives available. Certainly in this case the offer to  
8 redact the names, remove the names, all of those options  
9 were available. They just don't want that information  
10 available.

11 I think that the trade secrets concept is a valid,  
12 legitimate area of an exception in discovery that can be  
13 dealt with, but to parade the notion that a company that  
14 permitted people to be terminated and then use the employee  
15 concern program to justify it and then protect that as if  
16 it's a valid program, as if somehow that is going to protect  
17 the public, when all the workers know the program is a bogus  
18 program, just shows that the NRC is being duped. Nobody  
19 believes that. The workers don't believe it. The company  
20 doesn't believe it. The concept that the NRC would believe  
21 it is just unacceptable.

22 I think that you need to re-look at that policy  
23 statement to ensure that law firms representing utilities  
24 cannot misuse and so narrowly construe that policy that they  
25 can manage to keep lawyers like me from bringing information

1 to the NRC that I recognize as safety significant. Unlike  
2 the four of us who do a lot of litigating with the agency  
3 and the NRC, some regular lawyer out in Boise, Idaho, who  
4 doesn't know whether or not a safety concern is something  
5 significant and is generally in his regular practice used to  
6 having gag orders imposed is creating a very, very dangerous  
7 precedent.

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1 MR. LIEBERMAN: We've talked about the DOL process  
2 and the impact on the employee and protecting the employee,  
3 the cost of the employee and things of this sort. Has  
4 anyone ever considered use of alternative dispute  
5 resolutions or other techniques to try to resolve some of  
6 these issues?

7 I know in other contexts, because of the problems  
8 with lengthy and expensive litigation around the country,  
9 alternative dispute resolution concepts are being addressed.

10 MS. BERNABEI: The only way that alternative  
11 dispute resolution procedures ever work is if the two  
12 parties involved have some power and the only way an  
13 employee is going to get any power is through the legal  
14 rights and the forums that are available to him.

15 So in the current system, where most of the chips  
16 are on the other side, I don't think that there would be any  
17 use of alternative dispute resolution. We're talking now  
18 about creating and empowering workers to such an extent that  
19 they can protect their legal rights, whether it's through an  
20 NRC mechanism or Department of Labor mechanism or civil  
21 cause of action. But without any effective legal mechanism,  
22 ADRs are -- alternative dispute resolution, ADRs are totally  
23 out of the picture.

24 And even now, my view is that they're really being  
25 pushed by a lot of industries because management does have

1 more power than the employees and they can more effectively  
2 get more through those mechanisms than they can in court,  
3 where you, at least in some cases, have juries.

4 MR. COLAPINTO: I'm sorry, Lynn. I thought you  
5 were done there for a moment. I'd have to share that view  
6 and I'd have to say that I don't think ADR is something --  
7 I'd be shocked if utilities were interested in doing it. A  
8 lot of times they're not interested in settling these cases.  
9 They want to wear the person down, grind them.

10 The money is not the problem here. When the  
11 utilities finally come to the table, it's not -- money isn't  
12 the issue. These cases get to be very personal. There are  
13 personal vendettas against the individual to the extent that  
14 in some cases that are being litigated now, they want to  
15 throw the whistleblower in jail. They accuse the  
16 whistleblower of deliberately violating NRC regulations.

17 Section 210(g) is being raised as a defense in  
18 case after case now. In one case, the defense was so  
19 absurd. They said that because the individual had emotional  
20 problems, they brought it on themselves; so, therefore, they  
21 deliberately violated NRC regulations and the utility should  
22 be off the hook.

23 That's the mentality out there and I don't think  
24 ADR is going to even be considered in this context.

25 MR. LIEBERMAN: If the licensee supported it,

1 would you consider that?

2 MR. COLAPINTO: I think it would be a revolution  
3 and you're not going to go from the point where they want to  
4 throw your client in jail to the point where they want to  
5 sit amicably across the table and truly resolve the problems  
6 that exist.

7 A lot of these cases could be resolved at a very  
8 early process. Many of the cases that come forward can be  
9 resolved at the conciliation stage in the Department of  
10 Labor. Very rarely is it ever used. But a lot of these  
11 cases, I think most of the attorneys would share my view, is  
12 that they could be -- they could settle these cases for a  
13 song and a dance and save themselves a lot of time and  
14 trouble at the early stage, but they choose not to.

15 They choose to litigate these cases and they  
16 choose to prove their point. The point is, in my opinion,  
17 making an example out of a person who comes forward.

18 MS. GARDE: I agree with that. If the utilities  
19 wanted to have an ADR type of process, the conciliation  
20 stage is available for that and it can be as informal or as  
21 formal as any utility wants it to be.

22 I was involved in a case in which, at the  
23 conciliation stage, we had started on the path to some form  
24 of an ADR and that just exploded when it was clear that  
25 management was telling the attorneys, against the attorneys'

1 advice, that this was a case that they could not and would  
2 not even consider settling and it had to go to the mat.

3 I think the problem is that as soon as those flags  
4 go up, the NRC runs in the other direction and says call me  
5 when your fight is over and I'll see if there's anything  
6 here left for me to salvage to do something about. That's  
7 exactly what happens.

8 I think that if you want to successfully see any  
9 change in this process, it's going to require the agency to  
10 flex their muscle. Lynn has been around long enough to  
11 remember Zimmer and I think that --

12 MS. BERNABEI: That was the last time we ever saw  
13 any enforcement action out of the NRC.

14 MS. GARDE: That's right. That's right. And  
15 Zimmer was a very long time ago. But to his credit, I have  
16 to tell you with all the problems I had with Mr. Keppler in  
17 Region III on and off over the years, that his willingness  
18 to lock the gate at Zimmer and shut the plant down the day  
19 after they were dumping buckets of urine and feces on the  
20 inspectors made more of a difference at Zimmer and at that  
21 plant than anything that's happened in the last decade.

22 MS. BERNABEI: And, also, not just at Zimmer, but  
23 in the industry.

24 MS. GARDE: Right.

25 MS. BERNABEI: I think for some relatively short

1 period of time, the other utilities saw one bad plant really  
2 be disciplined and then they started taking seriously the  
3 whistleblowers and the kind of retaliation they could meet.

4 MR. LIEBERMAN: Richard, do you have any views on  
5 ADR?

6 MR. CONDIT: Yes. Just in terms of sort of  
7 echoing what Lynn said, I think the only way ADR works is if  
8 both sides have equal rights. Often what you see in  
9 grievance -- if you look at various sites that have  
10 grievance processes and things like that, it's a very one-  
11 sided affair and you're not going to get an ADR or a dispute  
12 resolution process that's going to work unless the sides  
13 have equal rights.

14 Then I also have to agree with what, basically,  
15 David and Lynn and Billie are saying about the perspective  
16 of utilities with regard to these cases is to wipe out the  
17 individual. They look at these cases as a -- their desire  
18 is to create the exact chilling effect that we're trying to  
19 avoid here.

20 Their desire is to make it so painful and publicly  
21 obvious of its painful nature that no one will ever bother  
22 to do this again. So no matter how reasonable our side may  
23 be and our worker might be on the issue of settlement at the  
24 earliest stages, as David mentioned, even in the  
25 conciliation process, it generally doesn't happen because



1 they need to grind them out.

2 The only way you're going to change that culture  
3 is, as Billie is pointing out and as I've said in my  
4 beginning statements, is to really be extremely aggressive  
5 and serious about enforcement and make it really painful.

6 MS. GARDE: Let me make one other point, though.  
7 There is one utility, which I don't feel comfortable  
8 identifying, but there is one utility in the country that  
9 has taken a little bit different approach to problems. In  
10 the case of this utility, they have, on two occasions, hired  
11 me to do an analysis and a training seminar of problems that  
12 had the appearance to them, to their management, of creating  
13 a chilling effect.

14 I went into that utility and did -- let's see,  
15 I've been there three times and done three different  
16 sessions with relatively small groups of management and  
17 engineers. One of those times was in response to the  
18 handling of a particular situation which did not raise to  
19 the level of enforcement action by the NRC, but which had  
20 enough earmarks of mishandling by the engineering department  
21 that the utility felt, the management felt it needed to get  
22 the heads straight of the engineers and how they dealt with  
23 a whistleblowing situation internally.

24 They called me back and I went back and had  
25 another session and we did remedial training, because they

1 obviously hadn't paid attention the first time, and we  
2 analyzed what happened.

3 I thought that that was an incredibly effective  
4 session. It was a very open session. It was a session in  
5 which I heard engineers get off their chest what they really  
6 thought about why this person had done that. The honesty in  
7 the session really surprised me because I heard firsthand  
8 from the people who were involved in the situation that,  
9 look, it was just this guy's motive, his motive is bad.

10 But by the end of the session, even the engineers  
11 were agreeing that they had not handled it right, because  
12 instead of looking at the issue, they looked at the motive.  
13 And instead of looking at solving the problem, they looked  
14 at how to discredit the guy.

15 I don't know if it will succeed ultimately or not  
16 succeed, but it was a session in which the NRC did not take  
17 strong enforcement action, which it didn't take being beat  
18 over the head by a two-by-four, and which I thought had some  
19 real positive results. But that's one utility out of a  
20 whole nation and I haven't heard of anybody else doing any  
21 of that.

22 MR. LIEBERMAN: That raises another question.  
23 That is how do you measure the climate or receptiveness of  
24 employees to raising concerns? Some licensees may be more  
25 committed than others. Some may take more steps than

1 others.

2 We're looking at how we can focus our resources on  
3 those licensees who have problems. When they tell us  
4 they've taken actions to improve those problems, how do we  
5 go about measuring whether they have been successful in  
6 removing potential chilling effects and things of that sort?

7 MS. GARDE: I think that there would be absolutely  
8 nothing wrong, although you might consider it a bureaucratic  
9 nightmare, with having some direct communication with the  
10 employees. I don't know what ultimately would come out of  
11 it, but I wouldn't exclude the notion of having the  
12 equivalent of what Keppler did at Zimmer on a much larger  
13 scale.

14 I don't know if you remember that, but what  
15 Keppler did before he'd let them open the plant back up was  
16 call the entire workforce into two sessions, three sessions,  
17 where he had all the employees of the plant and no  
18 management in an auditorium. I think there were three  
19 sessions in which he just said, look, these are your rights,  
20 this is what I'm here to do, this is what I'm here to find  
21 out, here's our phone number, and I want to know what  
22 problems are out there.

23 Now, I'm sure you can't do that at every plant  
24 across the country from Washington, D.C., but you certainly  
25 could do the equivalent of giving every employee at a

1 nuclear plant a written questionnaire to be directed back to  
2 the NRC, without the utility's involvement, and it could be  
3 done anonymously, that says we're trying to find out exactly  
4 what is the level of freedom to raise concerns and would you  
5 do that.

6 It doesn't have to be, I think, much more than a  
7 couple basic questions and some blank spaces, because  
8 workers that care about their jobs, and most of them do, and  
9 have some sense of protection or anonymity are going to tell  
10 you the truth.

11 MS. BERNABEI: Another possible approach is what  
12 the NRC essentially imposed on TVA back in 1985. They  
13 essentially forced them to hire an independent contractor,  
14 the Quality Technology Company, and they did a preliminary  
15 sort of interview with all the workers at the Watts Barre  
16 plant just to get a feel for the scope of the problems that  
17 they were going to face in terms of investigating.

18 I think you could pretty much get an idea from a  
19 very simple kind of survey by some independent contract or  
20 by the NRC itself of what -- as long as it didn't target  
21 anyone individually, about what the scope of the problems  
22 are.

23 The other thing -- and this I think people have  
24 been urging in the Commission for a long time. I don't  
25 think you need -- I think if you're going to look for all

1 the bad plants, you're going to spend the rest of your life  
2 doing that. I think if the NRC took effective enforcement  
3 action at one known bad plant, and I think there's several  
4 that come to mind. It could be TVA, it could be Palo Verde,  
5 it could be South Texas, some utility that's known for being  
6 off the scale in terms of harassment and intimidation.

7 You could go in and take effective enforcement  
8 action in any of those, against any of those licensees, and  
9 if you did that, it would send a message to the industry.

10 MR. LIEBERMAN: But given that the question is,  
11 and I think you mentioned it earlier, how do you know  
12 they've been effective in taking remedial action. With  
13 thinking about the survey concept, those employees who have  
14 concerns, I'm sure they will give their views. There may be  
15 another group of employees haven't felt the need to raise an  
16 issue, whatnot, I'm not sure how they would respond.

17 MS. GARDE: I think honesty is a real good  
18 approach here. I think you could say in your survey the NRC  
19 is taking a new approach to this thing. We're concerned  
20 about it. We're going to take a year to figure all this  
21 out. We're going to try to take some effective action and a  
22 year from now we're going to send you another letter. And  
23 what we want to know is have you seen changes.

24 We're going to be doing this in Washington. We're  
25 not going to be there every day to see what the effect is.

1 Tell them right from the beginning we're going to try a set  
2 of actions, we want to eliminate the chilling effect and  
3 open up an open atmosphere, and we're going to write to you  
4 again in a year and find out what effect our actions in  
5 Washington have taken and just see what happens, try it for  
6 a variety of things.

7 I think Lynn is absolutely right. I think you  
8 should pick out some of the plants that are out of control  
9 and my personal belief is that those plants are out of  
10 control because they've got law firms that are telling them  
11 they can beat those guys, we can beat those guys, and  
12 they're filling their pockets with fees and they're  
13 litigating those cases to death, instead of having anyone in  
14 management look at what does this mean for the plant.

15 Unless you can make those managers responsible to  
16 you and not their lawyers for what's going on at the  
17 facility, you're never going to break that pattern. It's  
18 just not going to happen, because they do not feel  
19 responsible to you.

20 They think all they have to do is say it's in  
21 litigation, please stay away, and you'll go run for the  
22 woods.

23 MR. CONDIT: Just to add, it's not just the plants  
24 that you need to assess how are we doing. You have to  
25 assess how are we doing at the NRC. You need to make a

1 worker-friendly environment, such that you get -- I realize  
2 your ultimate goal, which is an excellent one in the utopian  
3 sense, is to create a culture in the managing of facilities  
4 whereby the workers go to managers and problems get  
5 addressed, but we know that we're not going to reach that  
6 utopia.

7           So what we do require, then, is that the NRC  
8 become a real alternative to going to management. Right now  
9 it is not a real alternative. So not only must you assess  
10 and survey how whatever you implement is doing on the site,  
11 but you must also assess and survey how are we doing in our  
12 employee allegation management program.

13           The issues that David raised about confidentiality  
14 and a number of other things are critical issues that must  
15 be addressed with respect to that situation. Creating an  
16 environment where people trust you is going to take a little  
17 time, but you also must do that assessment internally.

18           MS. BERNABEI: Just to add one further thing in  
19 terms of how you could -- a method of evaluation of how a  
20 utility is doing. In most of the sites where there's a lot  
21 of whistleblowers, whistleblowers do not rely on the  
22 government to protect them. They rely on other  
23 whistleblowers.

24           So there are informal networks of people that have  
25 developed in almost all of the plants, at least where there

1 are serious, serious problems. I think if the NRC could  
2 connect to those groups, whether through the people that are  
3 public or through some representatives of those groups, you  
4 could find out in a very short fashion whether things are  
5 better or whether they're worse.

6 For instance, at TVA, it's clear that things are  
7 much, much worse than they were a few years ago. They've  
8 gotten rid of most of the people and they have a workforce  
9 that's pretty terrorized. So the number of complaints are  
10 going down.

11 But that would be very easy information if the NRC  
12 had any people down there that could connect with the whole  
13 network of people that have developed, both the more public  
14 people and then sort of the layer of people that are sort of  
15 being helped and assisted by the public layer of people.

16 MR. GREEVES: Do you see patterns in other  
17 industries -- the chemical industry you must represent.  
18 What do you see in the other industries? We've heard a lot  
19 about NRC and these programs don't work. Do they work  
20 anywhere? What do you see in the chemical industry?

21 MR. COLAPINTO: The chemical industry and the  
22 other industries covered under the other environmental  
23 statutes, there aren't very many cases out there. You guys  
24 are ahead of the game, because what you have done is you've  
25 required posting and you've required informing the workforce



1 that they have those rights available.

2 In the chemical industry, in the toxic waste and  
3 these other industries that are covered under the Clean  
4 Water Act, etcetera, etcetera, etcetera, there maybe are  
5 five cases filed a year, if that, under all of the other six  
6 acts combined. And trying to get the EPA to impose a  
7 posting requirement is something that we've been trying to  
8 work on for years with no success.

9 So there's no way to measure and compare our  
10 industry here, the nuclear industry, versus the other  
11 industries. It's just not -- because there virtually is  
12 nothing happening out there.

13 MS. GARDE: Let me also answer that.

14 MR. LIEBERMAN: Can I just respond? I understand  
15 that the Department of Labor is in the process of issuing  
16 regulations that require a posting, I think, of all their  
17 whistleblowing statutes.

18 MR. COLAPINTO: That's true and maybe it will  
19 change and maybe there will be something to compare it to,  
20 but right now there's nothing to compare it to.

21 MS. GARDE: I've been doing quite a bit of work in  
22 the oil industry over the last two years and I've been  
23 involved in a number of big cases. As much criticism as I  
24 heap on the NRC, I'll have to tell you I'm in the same  
25 situation I was when Keppler used to say "if you think I'm

1 bad, go to the other regions, go to the other regions,"  
2 because this agency and where it's at is a decade at least  
3 ahead of the oil industry.

4 I've got a number of cases against the Alyeska  
5 Pipeline Service Company in Alaska and it got a lot of  
6 public attention a number of years ago, but they literally  
7 hired Wachenhut, which is at many of your nuclear plants, to  
8 conduct a covert surveillance in -- this is 1990 -- in order  
9 to identify those employees at its service company that were  
10 leaking documents to citizen activists, including monitoring  
11 their phone calls, picking up their trash, acting like a  
12 dummy environmental corporation.

13 I think the last time that I know that's happened  
14 within the nuclear industry was Georgia Power in the late  
15 '60s or early '70s. But I would also caution you in that  
16 regard that those plants that have Wachenhut as security  
17 departments, I think you need to take a very hard look at  
18 because there is a great deal of surveillance training given  
19 to Wachenhut guards.

20 MR. COLAPINTO: I'd like to go back to the earlier  
21 question about how can you be sure that there's been some  
22 type of correction at these plants. I'm a little bit  
23 dubious about surveys, given turnover in the workforce. A  
24 lot of utilities are downsizing and going to contract labor.  
25 A lot of the people that experience harassment, intimidation

1 work outage to outage and I don't know how you'll ever be  
2 able to adequately measure that.

3           There's also the problem of contract employers  
4 doing the harassment versus licensee management. I'm not  
5 sure you'll ever be able to get a statistical fix on what's  
6 happening out there at particular plants.

7           The other problem is you're never going to really  
8 know when a certain event is going to set off a chain  
9 reaction of motivating management to engage in acts of  
10 retaliation. It could happen anywhere and a lot of it has  
11 to do with the mentality in the industry that there's a  
12 cost-benefit analysis at work here; that in order to save  
13 the company a few dollars, it's worth litigating that case  
14 out to the end.

15           Take a look at the Georgia Power example that's  
16 going on at Plant Vogtle. The explosive retaliation and  
17 wrongdoing allegations arise out of the coverup of an  
18 accident that no one knew was going to happen beforehand.

19           The other problem that exists is you've got plants  
20 getting older and management is changing, ownership of  
21 plants changing, and other forces that will drive utilities  
22 to try and minimize the problem and attack the messenger  
23 instead of solving the problem.

24           I think your best tool, again, is to use strong  
25 enforcement action, to use revocation of license as a threat

1 and as a tool in the places that are out of control, and to  
2 measure, at least on the one hand, if there are repeat  
3 offenses.

4 If people are not coming forward with DOL  
5 complaints anymore, either it's because the situation has  
6 improved or people don't want to go through that process and  
7 have been turned off by it all together. The ideas of  
8 contacting people who work there, who have been witnesses in  
9 cases, who have been confidential allegers or who are  
10 friends of whistleblowers, the investigators for the NRC  
11 know who these people are. It's no secret. In fact, many  
12 of them are in constant touch with them and they're their  
13 primary source of information.

14 It has always amazed me how much information the  
15 NRC is able to gather, but not do anything about, and I'm  
16 not sure what happens to all of it. They do a good job of  
17 collecting the information. What happens to it after it  
18 gets there? I don't know.

19 MR. LIEBERMAN: Good question.

20 MR. COLAPINTO: I think that you shouldn't -- I  
21 don't want to discourage you from doing surveys and things  
22 like that. They may have a useful benefit, I don't know.  
23 It's untested. But if there's a repeat violation, then you  
24 know you've still got a problem. That's the Palo Verde  
25 problem and that's the South Texas problem, where you've got

1 -- you had prior cases.

2 The utility said it's all over, NRC, there's no  
3 more problems out here, there's no more chilling effect,  
4 we've taken steps, we're not harassing people anymore, and  
5 then, boom, another instance occurs.

6 MR. LIEBERMAN: Ben, do you have a question?

7 MR. HAYES: Yes. I have a couple of questions and  
8 I see we've only got about an hour or so left. The general  
9 sense that I'm gaining from the four of you is not  
10 unexpected, having been here a few years, but anyone can  
11 answer these questions.

12 Should the NRC become an advocate for the  
13 whistleblower and, if so, at what stage in the process would  
14 that be most effective?

15 MR. CONDIT: Can I ask a clarifying question?  
16 When you say advocate, in what sense do you mean advocate?

17 MR. HAYES: I'm talking if we're in a DOL matter,  
18 should the NRC become a party of that particular proceeding  
19 and should the NRC then, with the basis of the area  
20 investigation and our own preliminary investigation, work in  
21 concert with that employee in attempting to resolve the  
22 matter at a hearing? One question.

23 Second, what specifically could the NRC do to make  
24 the employee whole or is that even necessary? That is to  
25 say the question that has been put before us is you cannot

1 protect the employee, Mr. NRC, other than confidentiality.  
2 The concern is financial, mortgage, family, kids, car  
3 payments. What could the NRC do to rectify that situation  
4 and where in the process would it be most effective?

5 Third, we do have what is commonly called here a  
6 wrongdoer rule, in effect. Mr. Lieberman was a prime author  
7 of that particular rule. At what point should NRC exercise  
8 that particular method for individual accountability at a  
9 licensee?

10 I think these bottom line questions would create,  
11 I think Richard or Lynn used the word, deterrent effect.  
12 Deterrent effect. So I've tried to put just three bottom  
13 line questions to you four individuals and I would be  
14 interested in your views to try to address those,  
15 collectively or individually.

16 MS. GARDE: Let me address the advocacy question.  
17 Under the OSHA regulations, an employee's OSHA retaliation  
18 case only goes forward if the government agrees with his  
19 case and then the government becomes his lawyer.

20 MR. HAYES: Correct.

21 MS. GARDE: Or her lawyer. So there is some  
22 precedence out there for that activity. I personally don't  
23 like that regulatory system because so few -- the OSHA takes  
24 so very few cases. Where they do take a case, they're  
25 settled immediately.

1           I have never had an OSHA case where the government  
2 -- where I got the government to take it, where I got the  
3 General Counsels actually to proceed, where it did not  
4 settle. I think it is possible that some hybrid thing could  
5 come up with there. I would not be willing to give up the  
6 advocacy role and that private attorney role for an employee  
7 to the General Counsel's Office of the NRC, because I think  
8 that, first of all, you're not cut out to advocate on behalf  
9 of employees and you'd have to pick those cases very  
10 carefully.

11           But I certainly think that you have regulatory  
12 authority to come into a process in some way and say the NRC  
13 is an interested party in this case. To give you a good  
14 example, the case out of the Thermolag inspector at Comanche  
15 Peak was one in which the NRC could very easily have taken a  
16 role of advocate and, in that case, almost did because their  
17 enforcement action came out and the case was resolved.

18           I think that if you're going to take that  
19 position, you would be in a mindset that you would be  
20 willing to flex your muscles on what can the NRC do. NRC  
21 can do anything. You've got the keys to the plant. You can  
22 require, under the regulations that you have, any form of  
23 remedial relief. It isn't just -- you're not limited to  
24 imposing a \$65,000 fine if, after eight years, the  
25 Department of Labor rules in favor of a whistleblower.

1           You could require, unless somebody thinks  
2 differently here, but it seems to me you could impose an  
3 internal regulation that if a whistleblower won at the  
4 initial stage, he had to be reinstated. And if that  
5 reinstatement amounted to getting a paycheck while it was  
6 pending, he could still -- that could still be a condition  
7 of their license.

8           MR. GOLDBERG: It has been the Commission's  
9 longstanding position that we do not have authority to order  
10 a personal remedy. We've always maintained the position  
11 that we had Atomic Energy Act Authority to take enforcement  
12 action against licensees in the traditional sense of civil  
13 penalties and, when warranted, modifying, suspending or  
14 revoking the license.

15           That was why Congress enacted 210 in the first  
16 place, to provide an individual personal remedy, and they  
17 chose to do it at the Department of Labor.

18           MS. GARDE: Under your 50.7 regulation, you have  
19 the authority to take any action, up to and including  
20 revocation of a license under 50.7 if you find a chilling  
21 effect.

22           MS. BERNABEI: And the Commission used to --

23           MR. HAYES: Excuse me. It's always a pleasure to  
24 deal with attorneys, but what I would like to do -- you can  
25 discuss the law later. I'm really not concerned with the



1 law. I'm more concerned about trying to get issues on the  
2 table. If rules or regulations need to be adjusted or  
3 changed, then we can address that down the road. Let's try  
4 to get more resolution here as opposed to how we --

5 MS. BERNABEI: Can I answer to what Billie said?  
6 The approach -- I know, Ben, you suggested in the past it's  
7 sort of a collaboration between the Department of Labor and  
8 the NRC. Given the NRC's record up to this point, I'm not  
9 especially in favor of that.

10 I think that the NRC could do parallel  
11 investigations. They could even participate in Department  
12 of Labor hearings to the extent that they would not disclose  
13 all the information to the licensee, which has been sort of  
14 the practice up to this point.

15 But it doesn't seem to me that the idea of the NRC  
16 and the Department of Labor together sort of litigating,  
17 working on adjudicating a whistleblower's complaint makes a  
18 lot of sense. What the Commission could do is what it's  
19 already supposed to be doing, which is do a parallel  
20 investigation.

21 I think, as Billie does, that it has the authority  
22 right now in terms of imposing on the utility the  
23 requirement of maintaining a discrimination-free work  
24 environment, to say you have to make personnel changes, you  
25 can't fire people, you have to do certain things; otherwise,

1 we're not going to let you operate the plant.

2 MR. LIEBERMAN: I have two questions from the  
3 discussion. One, is there any concern if NRC did seek  
4 involvement in the DOL proceeding of seeking selective  
5 involvement, filing a an amicus brief or whatnot in some  
6 cases, but not all? Second, is there any concern for  
7 parallel investigations if our investigative findings are,  
8 say, not finding discrimination when DOL might find  
9 discrimination? Is that a concern?

10 MS. GARDE: I just don't think you'd have the  
11 resources to be engaged in every case, but you certainly --  
12 if you had one attorney on staff whose job was to work on  
13 this type of case, it seems to me that you could have an  
14 amicus brief that laid out the NRC's position that was  
15 almost pretty standard, which I think would educate a lot of  
16 the ALJs as to what things to look for and that they would  
17 give a lot of attention to.

18 I don't think that that would be that difficult.  
19 In terms of actual involvement, and I agree exactly with  
20 Lynn's concerns about information flow, but in terms of  
21 actual involvement, I think you would have to be selective.  
22 There's a lot of precedents for that. Our firm just did a  
23 big housing discrimination case, one of the very few that  
24 HUD actually participated in.

25 It was an excellent co-counsel relationship

1 between my firm and the lawyer that was sent from  
2 Washington, D.C. We divided up witnesses and took our  
3 various positions and worked well together.

4 So I don't think that it's a process that is  
5 unheard of in terms of working with private counsel and the  
6 government on behalf of a victim of discrimination. But I  
7 think if you're going to get into that advocacy role at all,  
8 I think that all whistleblowers are at least entitled to the  
9 benefit of the NRC's position. They're entitled to tell  
10 that ALJ, with some degree of authority, what I'm doing is  
11 in the public interest.

12 MR. LIEBERMAN: Even if, in a particular case, we  
13 might conclude that there was not discrimination based on  
14 the information available to us.

15 MS. GARDE: I guess what I'm thinking of is an  
16 amicus position of the agency that sets out, almost as a  
17 training tool to the ALJ, what are the issues at hand here,  
18 because a lot of the ALJs we get dealt in these cases don't  
19 have a clue to what's going on. As long as the agency is  
20 not sending a witness, I don't have an inspector on the  
21 stand, I'm left arguing both the public interest and my  
22 client's interest.

23 So I'm arguing the chilling effect importance of a  
24 case when the Judge should be able to refer to an NRC brief,  
25 if you were willing to do one.

1 MS. BERNABEI: The other thing about the parallel  
2 investigation, it wouldn't matter what investigation the NRC  
3 does unless it takes effective enforcement action. The  
4 basic problem is there's no -- the outer parameters of this  
5 is there's no enforcement action at the end of the line. So  
6 it doesn't really matter what the NRC does, unless that sort  
7 of anchor of whatever you do. But if you did parallel  
8 investigations with very, very serious enforcement action,  
9 then I think people would be willing to say if you found no  
10 discrimination, fine.

11 But I think just the fact you were doing an  
12 investigation with the threat of very serious enforcement  
13 action at the end if you found discrimination would have a  
14 deterrent effect. I think what you'd find is you wouldn't  
15 have to do a lot of these investigations.

16 MR. HAYES: Dave?

17 MR. COLAPINTO: I'd like to comment on the  
18 apparent conflict between the DOL process and NRC process,  
19 and I think that's a legitimate concern with respect to  
20 parallel investigations and it's something -- I think it's a  
21 problem that we have right now, frankly. It's happening and  
22 you're beginning to do enforcement actions and  
23 investigations while DOL processes are ongoing, and it's to  
24 your credit.

25 It's a problem that we have right now and we're

1 going to have to find a way to deal with that. I don't  
2 think it's necessary for the NRC to become a party to DOL  
3 proceedings in every case. In fact, I'm not even sure it's  
4 necessary that they become a party. There needs to be some  
5 type of mechanism that can be triggered perhaps at the  
6 request of the complainant to obtain access to information  
7 within the NRC's possession.

8 A couple of cases come to mind where the NRC is  
9 probably the only source of being able to present evidence  
10 of certain facts. For example, when a licensee alleges that  
11 a whistleblower has deliberately violated an NRC regulation,  
12 the Department of Labor doesn't have jurisdiction to make  
13 that determination. Only the NRC can determine whether or  
14 not an individual has deliberately violated an NRC  
15 regulation.

16 It's been longstanding precedent of the Department  
17 of Labor. They don't get into safety concerns. They don't  
18 get into interpretation of safety requirements. As that  
19 becomes -- as that comes up as a defense in these  
20 proceedings, as it's increasingly becoming, we're going to  
21 have to rely on the Commission to provide their expertise in  
22 DOL proceedings. Whether it's accusing a worker of  
23 violating security procedures or some safety procedure or  
24 what have you, we need access and input from the NRC.

25 MR. HAYES: How about in the area of protected

1 activity, David?

2 MR. COLAPINTO: Yes.

3 MR. HAYES: So that we could send in a favor that  
4 says we regard this employee's employment to be under the  
5 umbrella of a protected activity.

6 MR. COLAPINTO: Right, I agree. That should occur  
7 particularly when the NRC is on notice that that has arisen  
8 as an issue in the case, the utility is taking the position  
9 that something that should be considered protected activity  
10 is not protected activity. The Mosbaugh case comes to mind,  
11 where an individual engaged in the act of tape recording  
12 what he believed to be criminal acts.

13 There was virtually no input at all by the NRC in  
14 that case on that issue. In fact, there was none to educate  
15 the Judge with respect to the circumstances under which the  
16 individual engaged in taping, etcetera.

17 It had to be done at a later point. You're going  
18 to have to do it on appeal. The Secretary of Labor, when  
19 the appeal gets decided the wrong way by a Judge, who takes  
20 the position that something is not protected activity, the  
21 NRC finds itself in the position where they have to  
22 intervene anyway and at least write an amicus position  
23 statement with respect to whether or not that activity was  
24 protected.

25 It should be allowed earlier in the proceeding to

1 alleviate the problems down the road. It can be done at an  
2 early stage where the parties have a chance to develop a  
3 factual record before an ALJ and the Department of Labor.  
4 Right now, the problem with the Saporito case comes to  
5 mind, where here's an individual that's been blacklisted all  
6 over the industry and is being accused of not following NRC  
7 regulations with respect to security access.

8 The utilities are going to go out and hire  
9 independent experts, security experts, and say in my  
10 opinion, this fellow violated NRC regulations, and the Judge  
11 is going to make findings. We cannot get access to an NRC  
12 witness to come in and give a point of view on that because  
13 the investigations have been made, findings have been made,  
14 and we do not have access to that expertise. It would  
15 interfere with a law enforcement proceeding as the  
16 regulations currently exist.

17 MR. LIEBERMAN: David, I don't want to violate my  
18 rule about not getting into particular cases, but has anyone  
19 asked NRC to supply a witness in that case or other cases?

20 MR. COLAPINTO: Not in that particular case. We  
21 haven't done that yet. We're about to. We have asked for  
22 access to the reports which we believe dealt with that in  
23 the investigation and there is no way we can get near that  
24 stuff.

25 MS. GARDE: Every time I've asked for a witness in

1 the NRC, I've had to spend days and days of time trying to  
2 convince the agency even to get an affidavit, which I then  
3 would try to offer and which would unanimously be rejected.  
4 Not one affidavit I've ever got the NRC to do in lieu of  
5 sending a witness has been accepted by an ALJ in lieu of  
6 live testimony and it's been a waste of time.

7 MS. BERNABEI: There's one office that is an  
8 exception.

9 MR. HAYES: Is this in the area of NRC becoming  
10 user-friendly?

11 MR. COLAPINTO: Yes.

12 MR. HAYES: Is that what we kind of blink at this  
13 particular --

14 MR. COLAPINTO: Yes. And I think that that  
15 addresses with respect to NRC becoming a party in DOL  
16 proceedings. It's something that we just bang our heads  
17 against the wall whenever we have to get an NRC witness,  
18 because we can speak to people on an informal basis. We  
19 have an idea that information exists and that individuals  
20 within the NRC have a certain expertise or knowledge of a  
21 particular case, and then we cannot formalize that by  
22 calling the person as a witness without running into all  
23 kinds of red tape. It just becomes a nightmare.

24 MS. GARDE: Usually, that process really  
25 undermines the field inspectors, because a lot of these guys



1 have developed relationships with the witnesses, with people  
2 they have investigated, with people they've taken a lot of  
3 time with. They have their home numbers. And all of a  
4 sudden the guy says, okay, now I need you to help me and  
5 just tell the truth and testify and he says, well, I've got  
6 to talk to Washington, and that's the end of the road.

7 I had a hundred dollar bet with Sapporito, which I  
8 won, that he would not be able to get the guy from Region II  
9 to testify, even though he had told him he was going to come  
10 testify.

11 MR. COLAPINTO: Without getting into specific  
12 cases, there's one other thing with regard to the NRC in the  
13 DOL proceedings. That is there can be contact, there should  
14 be contact between investigators of DOL and investigators of  
15 NRC, because it is not uncommon for the NRC to have opened a  
16 file and have certain information developed already from an  
17 allegor with respect to engaging in protected activity,  
18 etcetera, that DOL investigators at the wage and hour level  
19 don't understand.

20 The Judges usually within the Department of Labor  
21 have dealt with a case before and at least are somewhat  
22 educated on what protected activity is. Field investigators  
23 for the Department of Labor are not always that well trained  
24 and are often new to the scene. There should be some more  
25 sharing of information at that level, as well, in terms of

1 the investigatory stage of the Department of Labor process.

2 The other thing is that the reverse is also true,  
3 I've got to say. It has been my experience that OI has a  
4 difficult time getting information out of the Department of  
5 Labor. I think it's a two-way street. There's a bottleneck  
6 there. We are often in the position of having to supply  
7 information such as transcripts from Department of Labor  
8 proceedings or other types of records from DOL proceedings  
9 because the two departments just are not connecting.

10 It's something that should be cleared up  
11 bureaucratically within the government. You've got one arm  
12 dealing with it over here and has the information and the  
13 other arm needs it and the only way they can get it is to  
14 communicate through the complainant's counsel, which is just  
15 not getting the job done.

16 MR. LIEBERMAN: These are obviously good issues  
17 that we're going to have to follow up and consider.

18 MR. HAYES: I have one last question and then I  
19 want to give the --

20 MR. CONDIT: I'm sorry. Could I address your  
21 three questions quickly? I haven't had a chance to say  
22 anything on them. Just quickly, in terms of the NRC  
23 becoming an advocate, I don't believe that the NRC should be  
24 the personal advocate of the individual to replace an  
25 individual attorney. But I agree with Billie and Lynn that

1 it would be very important for the NRC to be an active  
2 participant in establishing the public interest significance  
3 of a particular case or situation.

4 I would not just urge that that happen at a  
5 hearing level, but I would urge that that happen at the  
6 investigation level, as well, before the Department of  
7 Labor.

8 If the NRC has enough information to have made its  
9 own judgment that this is an important situation and we need  
10 to inform the Department of Labor that this situation is  
11 important, that these concerns, based on our preliminary  
12 assessment, are critical, that the person has engaged in  
13 protected activity, those kinds of things advanced at an  
14 early stage might help settle the matter very, very quickly.  
15 So more of an amicus role for the NRC, I think, would be  
16 great.

17 With respect to the NRC taking action to make  
18 employees whole, I think the best way to deal with that  
19 situation, so as not to duplicate what might occur in a  
20 Department of Labor process, in an optimistic sense, would  
21 be to perhaps create an awards system through civil  
22 penalties for the whistleblowers that come forward and take  
23 a chance and do the right thing and are proven to have taken  
24 a proper stance on an issue.

25 I think an awards system would be an excellent

1 public tool for demonstrating that employee information is  
2 important to the NRC and that it's so important that the NRC  
3 will reward certain levels of activism on the part of a  
4 worker and make it sort of a carrot for people, make it a  
5 badge of honor for people. I think that would be very  
6 important.

7           With respect to the use of the wrongdoer rule, I  
8 think if you use the wrongdoer rule such that it can either  
9 revoke a license or prohibit a contractor or licensee from  
10 getting an NRC license or working on an NRC project, I think  
11 that would be an effective and important step enforcement-  
12 wise to take, which would encourage whistleblowers and  
13 workers that the NRC means business.

14           In addition, to use it on a personal level, to  
15 have individual managers that incur personal liability with  
16 respect to their ability to continue to work on an NRC  
17 license project or to face criminal charges, I think is very  
18 important. The Environmental Protection Agency and  
19 Department of Justice have known for some years that the  
20 best way to ensure a deterrent effect for environmental  
21 enforcement is to personally make individuals liable through  
22 the criminal mechanism, through a civil mechanism, whatever.

23           Now, it's not done because it's a political hot  
24 potato, as much as it should be. But if you're going to be  
25 real serious about enforcement and you're going to gain the

1 respect of the workforce, you hold the bad guys accountable  
2 to the level appropriate. You will gain, slowly but surely,  
3 the respect of the workers and you'll get them to come  
4 forward.

5 MR. HAYES: My last question is addressed to Lynn.  
6 I was a little confused. Earlier, Lynn, in your opening  
7 remarks, I believe, when you referenced the ongoing  
8 litigation with Mr. Comley, did I hear you that that  
9 continuation is a detraction for the northeastern part of  
10 the country to bring issues to the NRC? Is that what you're  
11 saying?

12 MS. BERNABEI: I think it's worse than a  
13 distraction. I think it's very destructive for the NRC to  
14 continue to pursue this case against Mr. Comley because he  
15 is essentially an advocate for the whistleblowers. He  
16 attempted to serve as an advocate someplace it could come  
17 for comfort. And to see the NRC, which is supposed to be  
18 protecting whistleblowers and the public safety, go after a  
19 man, to his terrible financial and personal detriment, I  
20 think is really shameful.

21 And I think whistleblowers know exactly why the  
22 NRC is doing that, to shut up the whistleblowers at  
23 Seabrook.

24 MR. HAYES: You do understand that that action is  
25 by our independent Inspector General and not the NRC, per

1 se.

2 MS. BERNABEI: Well, I don't think you can -- I  
3 guess for the public at large and for those --

4 MR. HAYES: The NRC is the NRC.

5 MS. BERNABEI: The NRC is the NRC.

6 MR. HAYES: I understand.

7 MS. BERNABEI: And I understand that Deputy  
8 Director Rowie also had a lot of problems, Mr. Fortuna had a  
9 lot of problems with regard to this investigation. But I  
10 think when you have the agency or any arm of the agency out  
11 there going after somebody like Mr. Comley, who is  
12 essentially a whistleblower advocate, the public and the  
13 whistleblowers and the employees rightly discern that the  
14 NRC is not interested in protecting them.

15 MR. CONDIT: And that seems to have been repeated  
16 from the 1988 case where the NRC pursued GAP with regard to  
17 South Texas allegations. So it seems that periodically the  
18 agency sees the need to flex its muscles against  
19 whistleblower advocates in an effort to try to extract  
20 information rather than cooperate. It just sets a bad  
21 precedent and creates a very hostile environment.

22 MR. LIEBERMAN: John?

23 MR. GREEVES: Yes. I've got two questions. Let  
24 me state them. One, you've characterized how poorly these  
25 programs are run in a number of these areas. Within the

1 industry, there are other areas that apparently are running  
2 better. Can you offer any characteristics of those  
3 locations as to why they may be run better?

4 Second, do you see any differences between the  
5 reactor community and the materials community, if you work  
6 in some of the other materials licensees?

7 MS. GARDE: I don't work with any materials  
8 licensees. So I would not -- I don't have any experience in  
9 that area at all. I didn't understand your first question.  
10 Are you asking in what geographical areas there is some --

11 MR. GREEVES: No. Some licensees, there are a few  
12 hot beds where there's a large number of H&I cases that  
13 occur, and there are others where they don't occur. So my  
14 question is do you see any symptoms? Maybe you haven't  
15 gotten involved in those cases, those other licensees. Or  
16 can you comment on do they have a somewhat better program?

17 Some of these don't even have employee concern  
18 programs. Maybe it's good management. Do you have any  
19 comments on what you see in a positive sense at these  
20 locations?

21 MS. BERNABEI: It seems to me that there's a  
22 correlation. I wouldn't say so much about the employee  
23 concern programs, because I think most of them are terrible.  
24 But I think you do see a correlation between the safety  
25 problems at a plant and the degree of harassment against the

1 workers. The plants that have historic quality assurance  
2 breakdowns or are unable to fix serious problems are the  
3 ones where you tend to find the greatest levels of  
4 harassment and intimidation, and that makes a lot of sense.

5 Basically, the plants that are either unwilling or  
6 unable to fix their problems are going to have to suppress  
7 the worker complaints, because, otherwise -- well, it just  
8 makes a lot of sense. So I think that the so-called bad  
9 plants are the ones where they have either no quality  
10 assurance program or a quality assurance breakdown.

11 I think if you start looking at what are the  
12 plants where employee concern programs work, you're really  
13 not going to get very far because I don't think you're going  
14 to find any where there's really an effective employee  
15 concern program.

16 I think it's better to sort of go back to first  
17 principals and see what kind of system would we really want  
18 to see, not derived from historic experience, but derived  
19 from what people are saying would really be helpful.

20 MS. GARDE: I agree with Lynn on the employee  
21 concern programs. I have never seen an employee concern  
22 program that worked, that I had any respect for, that wasn't  
23 simply a funnel to try to get information from the workers  
24 before it got into the hands of the public, the NRC,  
25 advocates, and I think that that makes sense. The beginning



1 of these employee concern programs out of Detroit Edison was  
2 an alternative, and this is all well established in  
3 depositions, was an alternative to GAP.

4 It was created specifically designed to come up  
5 with a method by which workers would raise concerns  
6 internally and they would not go to GAP. That program was  
7 copyrighted. It was taken across the country. It was  
8 modified in a number of places.

9 The only program that I'm ever aware of that tried  
10 to do an honest job was Owen Thoro's programs. Those got  
11 shot down out of the saddle and Owen hasn't worked since in  
12 that area because he was doing an honest job.

13 So I think they can work. I think that it's  
14 demonstrated that they can work and they can provide a  
15 valuable service, but I don't think that's what they're  
16 being used for. Ben, early at Wolf Creek, you attempted to  
17 take on the whole issue of employee concern programs and do  
18 the right thing and you were shot out of the saddle just  
19 like Owen. The Commission didn't want effective employee  
20 concern programs and you tried very hard to get them and  
21 that didn't work.

22 The guy at your staff who was in charge of that  
23 effort has now left the agency to the agency's detriment.  
24 So I don't think that you can pretend that these programs  
25 are not what they set out to be. They were set out to be a

1 way to stop whistleblowers from going public. They've been  
2 successful in stopping workers from going public. What's  
3 happened is they have become a hot bed.

4 GAP sued the agency to try to at least make the  
5 worker concern programs come under the regulatory umbrella  
6 of 10 CFR 50, Appendix B, and you all successfully defeated  
7 that effort. So you've kind of got what you created. You  
8 have warnings for a decade that these programs were out of  
9 control, and one of those warnings, had they been heeded,  
10 would have eliminated the need to have this program now,  
11 because what you've done is now is have a decade of bad  
12 programs.

13 So the concept that you're going to change them  
14 overnight without putting them under 10 CFR 50, Appendix B,  
15 making them statutorily protected in some way with the same  
16 type of protections available to quality control inspectors,  
17 and have some independent accountability of those programs  
18 to the agency makes them useless. Not because they should  
19 be useless, because they could serve a valuable role, but  
20 that's not where we're at.

21 MR. COLAPINTO: If I could just address your  
22 question. That is I think it's better addressed to  
23 employees and whistleblowers who have worked at different  
24 plants. There are some who have had positive experiences at  
25 some facilities.

1 MR. GREEVES: That's what my question was.

2 MR. COLAPINTO: Right. And they've had positive  
3 experiences in raising safety concerns to the point where  
4 they never even had to dream of having to go to the NRC. My  
5 suspicion is that it's probably an attitude of management  
6 and it's probably something that is -- I don't know exactly  
7 what it is. It's difficult to get that from us because we  
8 specialize in places where they have problems.

9 MR. GREEVES: I thought I'd ask the question.

10 MR. COLAPINTO: And that's probably why you're not  
11 getting a very good response from us. But my suspicion is  
12 that if you ask the whistleblowers or employees that have  
13 been in different places and have experienced problems at  
14 the problem plants versus the other places where they have  
15 worked, it's been a different reception from management when  
16 problems are raised.

17 Let's face it. If the problems were dealt with at  
18 the line level or the level above, when they were raised and  
19 were dealt adequately with within the organizations  
20 established by the licensees, we wouldn't have this problem.  
21 We wouldn't be sitting here. I suspect that it's a failure  
22 of management.

23 The thing that I think you should consider is we  
24 have noticed from various plants that people change  
25 locations, managers change locations and travel from bad

1 plant to bad plant.

2 MS. GARDE: If it wasn't bad before they got  
3 there, it's quickly becoming bad.

4 MR. COLAPINTO: It seems like when you hear the  
5 name Palo Verde, TVA, South Texas, Turkey Point, there seems  
6 to be -- if you look at people's resumes, there's a lot of  
7 travel and frequent flyer miles going on there in terms of  
8 managers, and it's something the Commission should look at.

9 I think it's a big management problem. It's not  
10 going to solve all the problems, but management certainly -  
11 - their attitude, I think, is one of the sources of your  
12 problem.

13 MR. LIEBERMAN: Brian?

14 MR. GRIMES: I think you've hit on the area that I  
15 wanted to raise, which is the organizational issue. Ms.  
16 Bernabei, earlier, was in favor of the economic hammer to  
17 bring people's attention to this area. But I guess I was  
18 going to raise the fact that even if we get a very large  
19 incentive in place, the utilities are still faced with what  
20 to do and what to do seems to me to relate back to improving  
21 the organizational atmosphere. And our problem also is to  
22 determine whether that atmosphere has gotten better or  
23 whether everybody's just happy and doesn't care about  
24 safety, so there's no concerns coming forth.

25 So it seems to me the organizational issue which

1 you've addressed -- and I guess I would entertain any other  
2 comments that you might have on that.

3 MS. BERNABEI: Well, I think the sort of bad  
4 manager idea and suspending those people or banning them  
5 entirely is a very good one, and I don't think it's so hard  
6 to identify them. You're probably all familiar with the  
7 series of articles in the Houston Chronicle that detail how  
8 all the bad managers from TVA moved down to South Texas.

9 There's some of them we know that moved down to  
10 Florida Power & Light, but --

11 MS. GARDE: And the bad managers from South Texas  
12 before moved to Florida.

13 MS. BERNABEI: Right. So everybody in the  
14 industry knows who they are. My feeling is that they're  
15 brought specifically into bad plants to keep the workers in  
16 line, fire the whistleblowers and get people that are going  
17 to keep their mouth shut.

18 So I think a few selected -- selected pressure by  
19 the .RC on some of the sort of bad actors would have a  
20 tremendous influence in the industry.

21 MS. GARDE: Ben, you have done that in a couple of  
22 cases. You did it at Detroit Edison. It was a little late,  
23 by three years too late, but it was done nonetheless. And I  
24 think that that did have an effect, but that kind of action  
25 should have all happened within a year. You had a series of

1 problems from a particular department all pointing to a  
2 particular manager and that manager sat in place for three-  
3 and-a-half years after those problems happened.

4 I know you had a big fight about that. I know  
5 that was a lot of effort and I know that was the first time  
6 that was ever done. But if you could integrate that type of  
7 effort within the year after these things break, you'll  
8 eliminate chilling effects when they start to see  
9 supervisors who are directly responsible and directly have  
10 that kind of attitude removed at the requirement of the NRC.

11 So I know you all don't like to get personal, but  
12 these managers get very personal. I think that you've got  
13 to save these utilities from themselves a lot of times.

14 MR. LIEBERMAN: Jon, do you have any questions?

15 MR. JOHNSON: Yes. I do have a couple, one  
16 specific one. Richard, you mentioned something about a  
17 citizen suit, which I'd like you to explain that. I don't  
18 understand what that's about.

19 MR. CONDIT: Citizen suit mechanisms have been  
20 employed in the environmental arena to allow citizens or  
21 people at plants or projects that have environmental impact  
22 to be able to bring an action after proper notice to the  
23 responsible parties in the appropriate agencies, to  
24 basically -- it basically allows the citizens to stand in  
25 the shoes of the government and enforce the law.

1           So what I'm advocating is that the NRC get a  
2 legislative change that would allow citizens, which would  
3 include workers, to be able to enforce NRC standards by  
4 going to court or going to the NRC or whatever mechanism you  
5 wanted to create, such that there would not be a dead end.

6           In other words, you guys can often be so busy that  
7 you're not going to get to every enforcement issue around  
8 the country. We're acknowledging that. That's one of the  
9 premises of encouraging workers to come forward, because  
10 they're going to be your eyes and ears in many places where  
11 you're not able to be looking or having inspectors.

12           But the same thing is true on following through on  
13 those eyes and ears. You don't have enough people or  
14 resources, and no agency in the country does, to enforce all  
15 the provisions that you've got. You need to employ the  
16 workforce and the citizens to be able to have a mechanism to  
17 bring those enforcement matters to a head themselves, and  
18 that's what a citizen supervision does.

19           There are currently, in the Clean Air Act, the  
20 Clean Water Act, Superfund, most of the environmental  
21 statues, if not all of them, have a citizen enforcement  
22 mechanism that allows a citizen to enforce environmental  
23 standards.

24           MR. JOHNSON: And this would be something that  
25 would take place without NRC involvement.

1 MS. GARDE: What usually happens in those citizen  
2 suits is the citizen has to file a letter that gives 60-day  
3 notice of intent to bring an action. So, for example, if it  
4 was a worker, and I'm following your hypothetical idea and I  
5 think it's a very good one, a worker could file a notice of  
6 intent to commence an action against the company -- it could  
7 be the NRC, follow the same process, it depends on what it  
8 was.

9 But a worker could say I'm going to commence a  
10 civil action under 50.7 and they would then, almost in the  
11 concept of a private attorney general, they would put the  
12 agency and the utility on notice and then they would go  
13 forward, even though the NRC didn't have the time to do  
14 that, didn't have the energy to do that, to take the kind of  
15 activity that you would take if you had another 100 people  
16 to enforce every activity, if the worker cared enough about  
17 that.

18 MR. JOHNSON: And you're implying that this would  
19 be taken to some kind of court and this court would not  
20 involve the NRC in this matter.

21 MR. CONDIT: The way it's currently set up, Billie  
22 is correct, there is a notice provision and there are  
23 usually automatic intervention rights available for the  
24 agency that has jurisdictional responsibility over this  
25 issue.



1           So the NRC, at the notice stage, could decide to  
2 do something which would alleviate the problem all together  
3 and would mean that the suit would not go forward or it  
4 could, at some later stage, if it was not convinced that  
5 there was validity to the claim and wanted to see it go  
6 forward a bit, could insert itself as an intervenor in the  
7 action and participate as a party.

8           So the agencies are never cut out of the loop. To  
9 the contrary, they're informed early on so that they can  
10 take action, if they deem to do so.

11           MS. GARDE: Or they can just watch. They don't  
12 have to participate. You could have -- if this provision  
13 was implemented, you could have a lawsuit brought by any one  
14 of us on behalf of a worker under 10 CFR 50.7 and we would  
15 be arguing the same things that you would be arguing and  
16 could get the same relief awarded that you have the ability  
17 to award and then you could do what you're doing now, wait  
18 till that's all over with and take enforcement action.

19           MR. JOHNSON: Okay. I think I understand.

20           MS. GARDE: And that is working within the EPA and  
21 is commonly credited with having had the most impact on  
22 clean water repairs, in terms of cleaning up streams,  
23 cleaning up dumps, cleaning up ponds and lakes, whatever.  
24 The citizen suit provision has effectively provided the EPA  
25 with far greater expanded ability to proceed, because for

1 years they just threw their hands up and said, you know, we  
2 just don't have time to do all of this.

3 MR. JOHNSON: Thanks. I had one question for  
4 Lynn. It had to do with the deliberate misconduct rule in  
5 the standards. You mentioned that you think we should have  
6 a lower threshold. I think you mentioned a lower standard,  
7 but I think what you meant was a lower threshold for -- and  
8 you described it as being negligent.

9 I guess this is an area we've been talking about  
10 where I get the impression you feel that would have a big  
11 impact if we took action on individual managers or  
12 supervisors. So I guess what I'm interested in is what do  
13 you mean by a different standard in terms of negligence?  
14 How would we -- do you think that that would be determined  
15 in some kind of inspection or would we have to do an  
16 investigation? Could you just describe a little bit about  
17 what you mean?

18 MS. BERNABEI: I think if you were going to get  
19 into the business of disciplining individual managers, you  
20 would want a standard lower than the deliberate misconduct  
21 or essentially what could be interpreted as almost criminal  
22 conduct.

23 What I was talking about is if you had some kind  
24 of negligent misconduct or negligent failure to protect  
25 whistleblowers as a violation of NRC regulations, which

1 would essentially put a duty, which many of us think is  
2 already written into the law, the duty of licensee and  
3 licensee managers to protect whistleblowers, to create a  
4 discrimination-free environment.

5           The kind of discipline -- I think you would have  
6 to do some kind of investigation about that if you were  
7 really serious about taking discipline action and then the  
8 nature of the discipline would be dependent on the nature of  
9 the either negligence, non-feasance or misfeasance. But  
10 that's pretty much done routinely in terms of enforcement  
11 schemes.

12           I guess what, it seems to me, what you don't want  
13 to get into is setting such a high standard to take  
14 discipline against managers that it's never done and that  
15 you get involved in lengthy and sort of byzantine litigation  
16 of the nature that's gone around the material false  
17 statement.

18           MR. JOHNSON: The last question I had relates to  
19 contractors. Our actions have been mainly directly with the  
20 utility and even when there's a contractor involved, I think  
21 we all agree the utility is still primarily responsible.  
22 They're the ones that have the license for this facility or  
23 even if it's not a reactor.

24           Do you have any comments specifically with  
25 contractors or subcontractors or vendors, manufacturers that

1 may be doing safety-related work in this area?

2 MR. CONDIT: I think they have to be held to the  
3 same standard as the utility. I think with respect to  
4 enforcement, you need to cut off their life blood of being  
5 able to contract on NRC license projects if they are such  
6 bad actors and prove repeatedly or in one serious or several  
7 serious instances that they're a problem organization.

8 You can't divorce the utility from its  
9 contractors. So you do have to hold the utility, to some  
10 degree, liable for overseeing it. But I think you, by the  
11 same token, can't forget about the contractors and their  
12 managers and they should have the same duties essentially as  
13 the utility in terms of complying with worker protection and  
14 other kinds of safety standards.

15 So I don't think you can make any distinctions and  
16 you've got to go after them as aggressively. If you take  
17 action to stop them from participating in NRC license  
18 projects, that's going to make them tow the line very  
19 quickly.

20 MS. GARDE: Let me also respond to that with  
21 another comment. It's really a very small industry and it  
22 has been made a great deal smaller by the use of the  
23 computer programs by which industries -- the industry, the  
24 contractors, the utilities keep their workforce on these  
25 computer programs. As they go from one plant to another, in

1 order to get them badged, most of them, I think 90 percent  
2 of them are on those -- I don't know what the name of it is  
3 -- but on a computer program where they punch the person's  
4 name into the computer and then his whole history flashes on  
5 the screen.

6 Well, one of the things in that program, which  
7 I've just recently obtained a copy of the whole manual, is  
8 that there's a code in that program that if the person is  
9 deemed a security risk, which is a very nebulous undefined  
10 term, but certainly if Sapporito is now being accused of  
11 being a security risk, would apply to that case, the screen  
12 literally flashes warning, warning, warning and bells go off  
13 in the program and you cannot put that person into the  
14 system as an employee, unless you deliberately override the  
15 whole program.

16 You have to get all these extra sign-offs for  
17 that. Well, that might be good to keep terrorists out of  
18 the plant, but the ability to characterize someone as a  
19 security risk through these systems, which have absolutely,  
20 as far as I know, no control by the NRC, no oversight, no  
21 regulatory review, is just fraught with being able to cause  
22 the kind of problems that Mr. Sapporito has had when he goes  
23 from plant to plant.

24 I think what you're doing is essentially  
25 eliminating all industry whistleblowers from within the

1 system and because there's so many workers out there, the  
2 utilities are always going to be able to have a legitimate  
3 defense of some type while hiring a more qualified person.  
4 They just aren't going to get hired.

5 I think it's something you've got to look at.

6 MR. JOHNSON: Thank you.

7 MR. LIEBERMAN: Let me follow up. I presume in  
8 some cases, the vast minority, there may be people who raise  
9 issues, who raise concerns in bad faith, may provide us  
10 false information, they knowingly provide us false  
11 information, and that presents a dilemma because if we did  
12 take action against such an individual, the rumor mill may  
13 not get the real basis for us taking action. It would be  
14 someone came to the agency with information and we turned  
15 around and took action.

16 Do you have any thoughts on how we should deal  
17 with that type of an issue?

18 MS. GARDE: For the most part, without sounding  
19 overly critical, you've ignored allegations that you find no  
20 substance or merit to as a regular course of action. Unless  
21 you're saying that someone is deliberately feeding you false  
22 information in such a terrible manner that you feel like you  
23 have to take action, I would say that the risk of taking  
24 action against a whistleblower versus the harm that will be  
25 caused to your agency's attempts to do chilling effect would

1 err on the side of something very, very private. That would  
2 be very risky stuff.

3 MS. BERNABEI: I would also dare say that probably  
4 none of us have ever encountered a situation like that where  
5 there was an employee that any of us know that merited any  
6 attention from the NRC, where they were feeding you false  
7 information.

8 It's a little bit like if you do sex  
9 discrimination complaints. The question you always get is,  
10 well, what about the person that's wrongly accused. You  
11 know it occurs in the world, but it's just not -- it's not a  
12 serious problem.

13 MR. LIEBERMAN: Recognizing that we may not have  
14 the resources to investigate every case that we might  
15 desire, what would you think of a threshold where we would  
16 only investigate a case that was not settled before the  
17 opportunity to request a hearing before an ALJ at DOL?

18 MR. CONDIT: Basically, you're saying not to  
19 investigate anything while it's at the wage and hour level.  
20 Is that --

21 MR. LIEBERMAN: That's right. That if a case gets  
22 settled or even if we started to investigate the case, if a  
23 settlement was reached prior to the time the employer would  
24 have to or the employee would have to make request for a  
25 hearing before DOL, then we would terminate that

1 investigation.

2 MS. GARDE: How are you going to deal with the  
3 chilling effect that is inherent in the whistleblowing and  
4 termination or whatever the activity was? How are you going  
5 to address that?

6 MR. LIEBERMAN: I don't have a particular answer  
7 for that, other than we can't investigate everything. The  
8 question is weighing is there some benefit of getting those  
9 settlements --

10 MS. GARDE: I think there is a benefit of getting  
11 the settlements, but I think that you have to be careful  
12 that you look -- that someone looks at what's the impact of  
13 this situation. You could have a horribly public, noisy,  
14 loud, ugly termination and the whistleblower and the utility  
15 are willing to settle it two weeks later, so you don't do  
16 anything. The lasting impact of that is just a change in  
17 what we have now, which is that they're willing to fire you  
18 and pay 50,000, but they still achieve their objective of  
19 keeping a chilled workforce.

20 MR. LIEBERMAN: So making the employee whole is  
21 not enough to do this job.

22 MR. CONDIT: No. You have to look at your  
23 regulatory purpose. My view of the NRC's goal here is not  
24 just to see that individuals are somehow satisfied, although  
25 that's an ideal objective with respect to encouraging people



1 to come forward. So I think that's one reason to do that.

2 But you also must look at what is your particular  
3 regulatory interest in a matter. I think for a matter to be  
4 settled and not get NRC attention because it was settled is  
5 very dangerous, because I think that what you're then  
6 ignoring is your potential -- it could be an awful  
7 situation.

8 There could be an incredibly hostile work  
9 environment there and they might be willing just to shut one  
10 person up because they can keep everyone else in line and go  
11 forward. So you need to evaluate basically on a more  
12 substantive level the individual cases that come through and  
13 make judgments about how you will proceed and how much  
14 enforcement effort or how much investigative effort you'll  
15 put into it.

16 MS. GARDE: The problem that I have with that is  
17 that you really -- as an attorney that cares about what is  
18 going on within these cases, you really don't find out how  
19 horrible these things are until you get through this  
20 investigative stage.

21 I think that as much as I'd like to see my clients  
22 made whole immediately, I wouldn't feel comfortable about  
23 them being made whole immediately and that be the end of  
24 what is a serious problem. You'd have to build in some form  
25 of analysis of that in order to make a decision.

1 I think an across-the-board policy would be  
2 dangerous and you would have to have something built into  
3 that to get a handle on whether it's indicative of a far  
4 more serious problem that you need to follow up on.

5 MS. BERNABEI: I also think that -- there's sort  
6 of two things, I think. One is at the earlier stage gets  
7 involved, and I think you should do it at the point a  
8 complaint is filed and not wait till there's a settlement.  
9 That's going to have a tremendous influence on whether the  
10 complaint is filed, number one.

11 Number two, I have the feeling you're sort of  
12 looking at the number of complaints as a static number of  
13 complaints and how can the NRC do an investigation on all of  
14 them. If you do an investigation on a few of them and take  
15 enforcement action, you're going to get a lot fewer down the  
16 road. So I think you can't look at it as sort of a static  
17 situation.

18 If you start investigating from the beginning,  
19 take enforcement action where it's really warranted, I think  
20 you're going to -- hopefully, you will find that you'll have  
21 a lot fewer complaints down the road because there will be  
22 less harassment.

23 That's the ideal. So it's not sort of a zero sum  
24 game where you're going to have to pour incredible resources  
25 in. Hopefully, there will be a declining number of

1 complaints if, in fact, the NRC took effective enforcement  
2 action.

3 MR. COLAPINTO: I think you're going to have to  
4 evaluate where you want to put your resources based on where  
5 you perceive the problem to be in terms of a problem plant  
6 or the severity of the allegation. For example, if the  
7 allegation is coming from the head of the Quality Assurance  
8 Department retaliating, I think that's something that should  
9 certainly set off the lights and bells in the NRC that this  
10 is something that we should devote more resources to than  
11 your typical case.

12 I don't favor a hard and fast rule that no  
13 investigation until after the wage and hour investigation is  
14 completed. By that point, you're already, with the new  
15 statute of limitations of six months, you're already seven  
16 months down the road by the time the investigatory process  
17 is over.

18 I think that to be frank with you, some of these  
19 cases where employees are employed and are facing on-the-  
20 job harassment, lawsuits through the Department of Labor  
21 process is not a desirable option for the employee or for  
22 the attorneys who represent them. They're time-consuming,  
23 they're costly proceedings.

24 There is a role to be played by the NRC with  
25 respect to dealing with some of these concerns that come in

1 en masse where people are reporting harassment. One of the  
2 problems we have is when do you file a complaint of  
3 harassment? How many instances of harassment are going to  
4 be enough to convince a Judge that action should be taken?

5 The Department of Labor remedy is more designed  
6 for employees who get fired, who lose their jobs and things  
7 like that, but we're seeing increasing cases of hostile work  
8 environment cases because things have gotten so out of  
9 control.

10 In those types of cases where the employee is  
11 still employed, is still an alleger for the NRC and is  
12 facing harassment after having blown the whistle to the NRC,  
13 I think the NRC owes an obligation to that person in order  
14 to dispel the chilling effect, to take early investigatory  
15 action and enforcement action, if it's appropriate.

16 That's the only way you're going to stop the  
17 problem. You have to protect your source.

18 MR. CONDIT: Could I add just one other thing on  
19 that topic? You were talking about settlement as perhaps  
20 being one mechanism for determining whether or not the NRC  
21 should invest resources. I want to just say briefly that  
22 there are also other concerns with reliance on the  
23 Department of Labor process that I have and they were  
24 touched on a little bit, but I want to make sure that we  
25 catch them here.

1 Another one is timeliness. Now, that's not going  
2 to be so much of an issue now that it's changed to a six-  
3 month period instead of 30 days, but there are perfectly  
4 meritorious claims undoubtedly that will occur that may be  
5 untimely in terms of the Department of Labor action.

6 So I think you all, unfortunately, have to act  
7 somewhat independently from the Department. There are also  
8 other procedural problems that might arise that may get a  
9 case dismissed from the Department of Labor, that it's still  
10 a meritorious case for the purposes of being a harassment  
11 and intimidation issue that you all need to focus on.

12 So I'd like to caution against too much reliance.  
13 I know you're worried about duplication of effort, but I'd  
14 like to caution against too much reliance on the Department  
15 of Labor system and not taking some independent steps and  
16 making independent evaluations along the way on a case-by-  
17 case basis, as you deem appropriate.

18 MS. GARDE: And that's facing you now. I think  
19 that that's something you have to consider.

20 MR. GRIMES: One followup on the extension of the  
21 time from 30 days to 180 days to file. What are you  
22 advising your clients in terms of timing? Are you inviting  
23 them to file quickly or are you advising them to wait? I'm  
24 thinking of this in terms of interaction between the DOL  
25 process and the NRC process.

1 MR. COLAPINTO: I don't think it's been in effect  
2 long enough for us to give you -- at least for me to give  
3 you a response to that.

4 MS. BERNABEI: You don't think I'd have the luxury  
5 of making that determination. A person finds you when they  
6 find you.

7 MR. GRIMES: But when they find you, would you  
8 advise them to file immediately with DOL or to collect more  
9 evidence or what? What are we likely to see in terms of  
10 everybody waiting for 180 days and we have to make a  
11 decision on what to do in the meantime?

12 MS. BERNABEI: It depends on the situation. You  
13 never advise anybody to file anything, any complaint, any  
14 lawsuit unless it's really the end of the line, unless  
15 there's no other alternative, because it's not going to be a  
16 pleasant process. But most people don't have the luxury of  
17 sort of saying wait until the end of the 180 days.

18 MS. GARDE: In the one case that I have had some  
19 action under this 180 days situation, I think it's actually  
20 working to the advantage of the situation. I think this  
21 particular employee is working right now through the NRC, is  
22 still employed, and the 180 days has not yet occurred.

23 I think there is a slight hope that he may  
24 survive. If the 30 days was still in effect, he would have  
25 already had to file and he would have already been fired and

1 he would be on the outside looking in. It's a tenuous  
2 situation. We'll have to see how it works. But it's the  
3 potential that it's resolved.

4 MS. BERNABEI: I think there's another problem  
5 that's not unrelated, which is at least some Department of  
6 Labor compliance officers don't seem to understand the  
7 situation in which they should be doing an investigation and  
8 when they shouldn't. So given their workload, they just say  
9 we're not going to do an investigation. That happened in at  
10 least one case.

11 So while the amendments were supposed to be  
12 helpful to whistleblowers, I'm not sure that that's going to  
13 work out to be the case.

14 MR. COLAPINTO: If I might add. You also have  
15 another -- not to get involved in too many legal  
16 technicalities, but you also have another potential problem.  
17 You may not only be dealing with a 180-day statute of  
18 limitation. The new law says there's no Federal preemption.  
19 So in states where an employee has a remedy under state law  
20 for wrongful termination, it may be up to two years before  
21 that employee exercises his or her right to sue.

22 So that may be something that we see more. I  
23 don't know.

24 MR. LIEBERMAN: Does anybody else have any  
25 questions?

1 MR. HAYES: I have one question that has come to  
2 my mind and it's a -- as a regulator, we're often faced with  
3 balancing the civil versus criminal, especially now under  
4 our new regime here.

5 You're basically promoting the civil -- using the  
6 civil side of the house for remedies. We're faced with  
7 both. What is your view as to how the regulator could best  
8 serve the public in doing that balance?

9 MS. GARDE: If you've got a criminal case, then  
10 you should pursue it, because the deterrent effect of a  
11 criminal action or harassment or intimidation of an  
12 inspector will go probably a lot farther even than a million  
13 dollar civil jury verdict.

14 Nobody is going to want to go to jail and if you  
15 flex your muscle and can get that kind of evidence and you  
16 have that kind of case, you should pursue it. It would  
17 probably make a tremendous amount of difference.

18 MR. HAYES: Richard?

19 MR. CONDIT: I agree completely. As I was  
20 pointing out earlier, in the environmental arena, the  
21 Department of Justice and the EPA recognize that personal  
22 liability through criminal sanction is probably the greatest  
23 deterrent that they can have on any aspect of enforcing any  
24 part of their program.

25 What I would encourage you all to do is to look



1 carefully at how much criminal enforcement authority you  
2 have to ensure yourselves that you have enough to cover all  
3 the important areas of your regulatory program, including  
4 harassment of whistleblowers, because I think if you do use  
5 the criminal deterrent, and you can use it sparingly, but I  
6 agree with Billie, it's worth its weight in gold if you are  
7 successful in terms of its ultimate deterrents, because  
8 individuals will not want to take the risk if they know that  
9 you might be breathing down their necks and they might end  
10 up in jail or in a very serious situation.

11 MR. HAYES: Lynn?

12 MS. BERNABEI: I certainly would concur that it's  
13 certainly the most effective, the most stringent  
14 enforcement. I think the problem in the past has been, one,  
15 it hasn't been used against individuals. For instance, in  
16 the Three Mile Island case, it was used against the  
17 corporation and it became essentially meaningless. Not  
18 meaningless, but it was not as effective as it could be.

19 The second thing is I think while there are  
20 particular people, and particularly your office that's very  
21 -- that has the political will to actually pursue criminal  
22 prosecutions, the Commission, in the past, has not really  
23 shown that it has that kind of political will and nor has  
24 the Justice Department.

25 So I think until there's any real assurance that

1 there will be criminal prosecutions of the most egregious  
2 cases, the most any of us can hope for is some serious civil  
3 enforcement.

4 MR. COLAPINTO: In the serious cases, I think you  
5 have to use it. We've got people who work for utilities in  
6 supervisory positions now admitting they lied under oath.  
7 You've got people committing criminal violations. They  
8 should be held accountable for it.

9 MR. HAYES: Let me tell you what that faces. What  
10 it faces between the regulator and the employee is that it  
11 retracts and deters from our ability, then, to assist an  
12 employee in the civil process, and obviously that's to the  
13 detriment, possibly, of the employee during your DOL  
14 hearings and what have you. That's a real balance, you see,  
15 that we're faced with that I personally, as an office  
16 director, am faced with and this Committee is going to be  
17 faced with as to what recommendations we may make.

18 It's a dilemma that we face continually. So  
19 that's why I was interested in your view here.

20 MS. GARDE: Ben, with all due respect, you  
21 frequently aren't cooperating with the civil process on the  
22 basis of an allegedly ongoing criminal investigation, but I  
23 haven't seen you put anybody in jail yet. You've been  
24 saying that and I think that I have a lot of respect and  
25 admiration for you, but if you've got a case, I don't think

1 there's one of us at this table that would interfere with  
2 your pursuing a criminal investigation, even to the client's  
3 detriment, because ultimately to the client's benefit is the  
4 criminal investigation.

5 But don't tell us we can't help you because we're  
6 going to do a criminal investigation and then we do the case  
7 on our own. We don't have any help from you. You've got it  
8 all tied up under criminal investigation. We get to the end  
9 of the road and the guy hasn't even got a letter against  
10 him. That's what has been happening for the last couple of  
11 years and it's difficult, because you've got to tell your  
12 client, "you think they're really going to prosecute him?  
13 No."

14 MR. HAYES: We're talking about the government in  
15 toto because, as you know, NRC doesn't prosecute.

16 MS. GARDE: Right.

17 MR. HAYES: For the Department of Justice.

18 MS. BERNABEI: Many other agencies, for instance,  
19 LPA has very similar problems, that the Inspector General  
20 does criminal investigations and they have to forego certain  
21 interviews and certain kinds of activities if they really  
22 think they have a criminal investigation.

23 So it's not unique. I think it's just that -- it  
24 seems -- the NRC has not, at least as far as I know in the  
25 last seven to eight years, done any criminal investigations

1 or even done the investigatory work that's led to any  
2 criminal investigations.

3 So while it's certainly a terrific idea, I don't  
4 think anybody sort of has faith right now that the NRC,  
5 together with the Justice Department, is willing to do it.

6 MS. GARDE: And when FOIAs are denied on the basis  
7 of allegedly criminal investigations, we don't believe you.

8 MR. COLAPINTO: I think one of the problems under  
9 the FOIA is that even under your regulations and the case  
10 law is that it's been interpreted that even civil  
11 proceedings can be interpreted as law enforcement  
12 proceedings. So we've got a problem on our side of even  
13 having -- not making a referral to Justice and keeping open  
14 an enforcement proceeding that has only civil penalties  
15 attached to it is going to have the effect of denying us the  
16 information, as the system exists now.

17 With respect to the criminal referral cases, I  
18 don't think that you're doing any service to society by  
19 saying that the whistleblower has to wait a little longer to  
20 get the personal remedy. He should not have to wait. Let's  
21 not prosecute because we don't want to keep this person out  
22 there waiting a little longer.

23 I think that that's something that the individual  
24 is going to have to give up and accept the delay process  
25 that's involved. Where you could help us is that if you're

1 in a situation where you have a referral made, there's got  
2 to be some type of information flow from NRC and Justice to  
3 that DOL Judge to alert him or her that there is that  
4 process out there and that when that process is concluded,  
5 that there is information that would bear on the issue of  
6 the discrimination.

7 There are certain -- you've gone through certain  
8 enforcement hoops before you even make the referral. It's  
9 in the extraordinary case where you've done that before  
10 there's a -- it's the extraordinary case where you've  
11 reached that conclusion and made the referral while the  
12 Department of Labor case is ongoing before a Judge.

13 In those few cases, I think the whistleblower  
14 should be willing to wait to see what the outcome is,  
15 because there's a greater benefit at work here.

16 MR. LIEBERMAN: Any other questions?

17 [No response.]

18 MR. LIEBERMAN: I thank each of you for coming  
19 today. You've given us a lot of useful ideas for us to  
20 consider. We look forward to any written comments you might  
21 provide us to further elaborate your views on the various  
22 questions we've asked in the Federal Register Notice.

23 With that, I close the meeting and I thank you  
24 again.

25 [Whereupon, at 12:10 p.m., the meeting was

1 concluded.]  
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NAME OF PROCEEDING: Meeting on Whistleblowers

DOCKET NUMBER:

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