

BEFORE THE OFFICE OF THE SPECIAL COUNSEL OF THE  
MERIT SYSTEMS' PROTECTION BOARD

REQUEST FOR AN INVESTIGATION PURSUANT TO 5 USC §1206(b)(7)

On behalf of Mr. Thomas W. Applegate, the Government Accountability Project of the Institute for Policy Studies ("GAP") submits the following disclosure pursuant to 5 USC §1206(b)(2). Mr. Applegate charges NRC investigator Gerald Phillip with violations of law; mismanagement as defined in 5 CFR 1250.3(e); abuse of authority as defined in 5 CFR 1250.3(f); perpetuating gross waste as defined in 5 CFR 1250.3(d); and perpetuating a substantial and specific danger to public health and safety. Mr. Applegate requests that the Special Counsel order a response from NRC Chairman Ahearne, as provided by 5 USC §1206(b)(7).

More specifically, Mr. Applegate charges that the NRC failed to perform a thorough and complete investigation of serious allegations he made to the Commission about the Zimmer Nuclear Power Facility in Moscow, Ohio. Mr. Applegate disclosed well-documented instances of theft and black-market smuggling operations at the plant; auctions of "hot weapons"; illegal shadow businesses that operated out of the plant to manufacture belt buckles with nuclear grade steel; widescale drunkenness among employees at the plant; serious safety defects, including faulty welds on 20% of the prefabricated piping in the plant; and coercion and retaliation against the quality control radiographers who uncovered safety defects.

Unfortunately, Report No. 50-250/80-09, on the Zimmer Nuclear Power Station, U.S. Nuclear Regulatory Commission Office of Inspection and Enforcement for Region III, (Final Review, July 3, 1980) ("NRC Report," attached as Exhibit 1) reflects an investigation conducted and reported in a wrongful and capricious manner. Mr. Applegate charges that the NRC investigation reflects neither the scope of his allegations nor the scope of NRC jurisdiction. Mr. Phillip restricted his investigation to a superficial review of three specific pipes. As a result, the citizens of Ohio remain as vulnerable to a grossly mismanaged, dangerous plant as they were before the NRC effort.

BACKGROUND

In December 1979 Cincinnati Gas and Electric (CG&E) hired private investigator Thomas Applegate as an undercover agent. His assignment, outlined in a letter from CG&E's director of media services, was to investigate "any possibility of misconduct on the part of anyone involved in the construction of the Zimmer Nuclear Power station." (See December 5, 1979 letter from David Altomuchis to Major CEA, attached as Exhibit 2.) His specific assignment was to obtain evidence of time-cheating by certain employees. In December 1979 and early January 1980, Applegate worked undercover as a "cost accounting engineer" at the site. He was authorized, through his cover, to roam freely throughout the plant and to compare construction sheets against the construction contract held by Kaiser Engineering International ("KEI"). (See June 6, 1980 Affidavit of Thomas Applegate at 7-8, attached as Exhibit 3.) His pretext also enabled him to speak with personnel from all levels of site construction and management. Before long, he had gained the confidence of both union officials and plant employees. (See generally Mr. Applegate's Confidential Reports to the utility, attached as Exhibit 4.)

In four weeks Applegate documented a scheme of labor-management collusion to permit and coverup illegal, dangerously negligent behavior among plant personnel; as well as dangerously faulty welds in key piping, indicative of a breakdown in quality assurance ("QA") practices. Bill Murray, his contact in CG&E management was pleased about the evidence of time cheating, but ignored the discoveries of safety defects and collusion by KEI. Instead, Mr. Murray ordered Mr. Applegate to root out any reason to fire Peabody Magnaflux ("PM"), the company performing nuclear x-rays (radiography) for the plant's quality assurance program. (Affidavit, at 4.) Applegate followed instructions but found that the radiographers were among the most conscientious employees on the site. His research only further confirmed serious problems in the plant's safety-related quality control program.

When Mr. Applegate pressed these safety concerns, his position as CG&E undercover agent was terminated abruptly in early January. Soon after, the utility fired the employees who had been the targets of his time-cheating investigation. Curiously, these same employees were vocal critics of lax safety practices at the plant and had provided Mr. Applegate with the early leads for his probe into quality control. CG&E knew of these employees' dissent, because Applegate cited their allegations in his confidential reports. After the mass firings, CG&E blew Mr. Applegate's cover. Contrary to normal procedure, the utility informed the dismissed employees of Applegate's role in their termination. Mr. Applegate's life since has been threatened on numerous occasions. (Affidavit,

at 20-21.) On April 1, 1980, after a mysterious break-in and theft of records from the PM trailer, the utility fired the radiographers, against whom Applegate had been unable to find any evidence of impropriety.

On February 15, 1980 Mr. Applegate telephoned the NRC Washington headquarters to disclose the conditions he found at Zimmer. (See Mr. Applegate's telephone records, attached as Exhibit 5.) Simultaneously, he sent his evidence for analysis to Mr. Upchurch of the Federal Bureau of Investigation ("FBI") in Cincinnati. Mr. Applegate also provided his evidence to Mr. Cissel of the United States Attorney's Office in Chicago. Each of these offices and agencies assured Mr. Applegate that his charges would be pursued. Those assurances rang hollow as time wore on and nothing was done. (Affidavit, at 13.)

The NRC consented to investigate only after Applegate contacted NRC Chairman John Ahearne's office. On March 3, 1980, investigators led by Mr. Phillip met with Mr. Applegate and reviewed some of his contentions and allegations. The following week they informed him that the NRC would pursue three limited areas of investigation. The three investigative charges included two charges of faulty welds, as well as an improper shortcut in the flushing system that cleans the piping. (See March 11, 1980 letter from Phillip to Applegate, attached as Exhibit 6.) The investigator's letter neither mentioned the quality assurance program, nor Mr. Applegate's charges of mismanagement and criminal activity at the plant.

Correspondingly, his July 1, 1980 report fails to provide an accurate record of the allegations. In fact, Mr. Phillip failed to mention the mismanagement and criminal charges at all. By completely omitting the bulk of Mr. Applegate's disclosure, Mr. Phillip limited the possibility of future review of his exercise of professional discretion. In effect, he also precluded referral of those issues to some other agency for appropriate review.

Even for the narrow issues he considered, Mr. Phillip's effort represents the most shallow level of investigation and documentation. The report offers no outline of investigative strategy; no sampling of the criteria by which Phillip made critical judgments on the scope of the probe; no list of documents reviewed or interrogatories; and no references to sworn statements. Mr. Phillip's report is a disservice to the public and to Mr. Applegate, who literally risked his life to blow the whistle on rampant crime, dangerous safety flaws, illegal retaliation, criminal scams, and wasteful mismanagement at the Zimmer plant.



JURISDICTION AND STANDARD OF PROOF

Pursuant to 5 USC §1206(b)(2), the Office of the Special Counsel "shall promptly submit" to the appropriate agency head any information which the applicant "reasonably believes" evidences a "violation of any law, rule or regulation, mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety...." 5 CFR 1252.3 requires that the agency head transmit to the Special Counsel within 60 days the written response required by 5 USC §1206(b)(7).

While Mr. Applegate is not a government employee, the Special Counsel's policy is to accept under §1206(b)(7) non-government employee disclosures based on a "reasonable belief." Letter from Acting Special Counsel Mary Eastwood to Thomas Devine (June 9, 1980). Under this interpretation, Mr. Applegate's disclosure is eligible for the Special Counsel's whistleblower disclosure conduit.

The regulations do not define "reasonable belief", the standard of proof that a whistleblower must satisfy in a disclosure. We propose that Mr. Applegate's disclosures be tested under the following definitions of "reasonable belief":

"an honest and rationally justified conviction at the time of disclosure, based on inference from personal experience or information derived from others."

This key phrase requires a new definition, because it traditionally means the "probable cause" standard for an arrest. But the legislative history of the Reform Act specifically rules out the criminal standard. The Senate Report on the Act states, "The Special Counsel would not require information amounting to 'probable cause' to conduct an investigation." (S. Rep. No. 95-969, 95th Cong., 2d Sess. 32) (Hereinafter "Senate Report"). This instruction is logical. It would be absurd to expect an employee to muster the same degree of proof to demonstrate "reasonable belief" that the police department investigative machinery must gather to show "probable cause." If the OSC requires a high standard of proof, an employee who acts in the public interest by contacting the Special Counsel early in a budding scandal could be rejected entirely and left vulnerable to reprisals:

Our proposed definition is similar to judicial tests in different contexts. For instance, as a justification for acting in self-defense, "reasonable belief" means "(a) belief begotten by attendant circumstances fairly creating it, and honestly entertained." Howard v. State, 110 A.2d 111, 112, 113 So. 365-66 (1896).



Our proposed definition also is consistent with that of the well-defined term "good faith," which the courts sometimes have treated as equivalent to "reasonable belief." Placer Co. v. Lee, Alaska, 553 P.2d 54, 58 (1976); Hutsell v. Commonwealth, 25 Ky. Law Rep. 262, 75 S.W. 225, 227 (1903). Basically, a "good faith" belief is a "real or actual" belief, Raab v. Cooper, 124 Cal. Repr. 590, 594, 51 C.A.3d 866 (1975), a belief grounded in "honesty of purpose" and freedom from fraudulent intent. Wendling v. Cundall, Wyo., 568 P.2d 888, 890 (1977). In administrative law cases on unemployment compensation, "good faith" is equivalent to "genuine." Unemployment Compensation Bd. of Review v. Pinger, 21 Pa. Commw. 61, 342 A.2d 781, 782 (1975). The phrase is flexible, and includes "honest mistakes(s)" within its purview. Edwards-Warren Tire Co. v. Coble, 102 Ga. App. 106, 115 S.E.2d 352, 858 (1960).

The above analysis is persuasive authority for our proposed definition. But since "reasonable belief" is new to the administrative law context, we examined legal definitions for each term. Our definition incorporates "reasonable" through the phrase "honest and rationally justified." This interpretation is consistent with legal authorities and judicial precedents. Bouvier's Law Dictionary defines "reasonable" as *inter alia*, "just; rational." (Bouvier's Law Dictionary 1022 (1948)). Black's Law Dictionary (4th Ed. 1958) turns to Cass v. State, 124 Tex. Cr. R. 208, 61 S.W.2d 500 (1933) to define the term as "synonymous with rational; honest; equitable; fair...." Black's cites several other decisions to apply the term in specific contexts. As a test of whether administrative rules are unreasonable, the court in Columbus Green Cabs, Inc. v. Board of Review, Bureau of Unemployment Compensation, 184 N.E.2d 257, 262 (1961), explained that "(r)easonable means fair, honest and just." In applying criteria for appealability in a tort, the court in Anderson v. St. Louis-San Francisco Ry. Co., Mo. App., 367 S.W.2d 657, 360 (1963), stated, "'Reasonable' means rational, just, fair-minded, proper, sensible, probable, sane, moderate."

Our proposed definition interprets "belief" as "conviction at the time of disclosure, based on inference from personal experience or information derived from others." Our proposed application of the term derives from numerous authorities. (Dallantine's Law Dictionary 129 (3d Ed. 1969)). Bouvier's defines "belief" as "(c)onviction of the mind, arising not from actual perception or knowledge, but by way of inference, or from evidence received or information derived from others." (Bouvier's Law Dictionary 113 (1948)). Black's Law Dictionary applies "belief" in the context of a test of management motives in a dispute over compliance with an NLRB order: "'Believe'... means to believe or to feel that something is true or at least probable." (Black's Law Dictionary 113 (1958)). The court in NLRB v. Pappe Broadcasting Co., 317 F.2d 1007, 1013 (5th Cir. 1963) stated, "The court in NLRB v. Pappe... reasonable grounds to

power; medical therapy, research and testing) ....  
be licensed and regulated by the Commission.  
10 CFR 8.4(b).

According to the AEA, the Commission's general "authority and responsibility" extended to include regulation of "the construction and operation of production or utilization facilities," including the construction and operation of nuclear power plants. 10 CFR 8.4(e) (1). An Inspection Division was designated to perform surveillance and inspection of nuclear facilities. The Division's responsibilities included "gathering information to show whether or not the contractors, licensees, and officers and employees of the Commission are complying with ... this chapter ... and the appropriate rules and regulations of the Commission." 42 USC §2035(c). Further, to enforce the Act and to safeguard "facilities, equipment, materials and other property of the Commission," the President may request the services of any government agency, including the FBI and the Department of Justice. 42 USC §2271(a) and (b).

When the Atomic Energy Commission was abolished by the Energy Reorganization Act, p.l. 93-432 (Oct. 11, 1974), AEC's authority was vested in the NRC and the Energy Research and Development Administration ("ERDA"). The Division of Inspection and Enforcement was created to conduct NRC investigations. Any worker or representative can trigger the process by forwarding a reasonable complaint that he or she witnessed some violation of regulations or licensing conditions. An inspection must take place as soon as is practicable. Most important, the investigation need not be limited to those issues raised in the employee's original complaint. 10 CFR 19.16(b).

There is no section of the Code of Federal Regulations which lists all areas of NRC jurisdiction. Instead, individual sections of the regulations flatly proscribe certain activities and create guidelines for others. The NRC and the FBI have joint jurisdiction over criminal activities; the NRC has the responsibility to refer criminal allegations and evidence to the FBI for investigation. NRC and FBI Memorandum of Understanding, 44 Fed. Reg. 75535 (1979). The Memorandum summarizes the NRC's role as follows:

"[When an attempted criminal act occurs] the immediate contingency role of the NRC would be one of gathering and assessing information to determine the situation, appraising and cooperating with the FBI in order to assist FBI response, and arranging for other needed possible contingency response assistance which is requested through NRC channels."

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The scope of the joint efforts includes "but [is] not limited to threats, material thefts and diversions, incursions or infiltrations, extortions, conspiracy, and sabotage relating to all facilities, activities and materials licensed under the Atomic Energy Act of 1954, as amended." Id.

All the claims Mr. Applegate presented to Mr. Phillip fall within established NRC agreements, rules and regulations, but Phillip refused to even acknowledge the bulk of the evidence. Consequently, his investigation and report does not cover the following issues within NRC jurisdiction and explicitly raised by Mr. Applegate during the initial interview:

1. sale of stolen guns on the site; 42 USC §52201(k), 2278 (a), (b) & (c), 2271 (a)&(b) (Affidavit at 9; 12-28-79 Confidential Reports at 2)
2. diversion of labor and materials for the personal benefit of a KEI superintendent, at a cost to CG&E of more than \$30,000; Memorandum of Understanding, 44 FR 75535 (December 20, 1979), 42 USC §2271(a) (Affidavit at 4-5; Confidential Reports at 2-3, 12-18-79 Confidential Reports at 1)
3. fabrication and sale over seven years of belt buckles constructed from nuclear grade steel worth millions of dollars in labor and materials intended for use in pipes, braces and components at the plant; Memorandum of Understanding, 42 USC §2271(a) (Affidavit at 5; 12-10-79 Confidential Reports at 2, 3, 4, 12 17 79 Confidential Reports at 1-2; Confidential Report: "Report of Misappropriation of Materials")
4. theft of two thousand pounds of copper cable smuggled in small lots and resold within a week for \$15,000 on the black market by 30 plant personnel, to finance a Christmas party complete with prostitutes; Memorandum of Understanding, 42 USC §2271(a). (Affidavit at 6; 1-2-80 Confidential Reports at 1)
5. an entrenched system of time card padding, implicitly sanctioned by KEI and CG&E, wasting significant amounts of time and money; Memorandum of Understanding, Zimmer Power Station-1 Final Safety Analysis Reports (ZPS-1 (1975), FSAR) 17.1.2.7 (Affidavit at 3-6; Confidential Reports: "Analysis of Time Cheating," Confidential Reports generally.)
6. drunkenness on the site; ZPS-1 (1975), FSAR 17.1.2.7. (Affidavit at 3, Confidential Reports generally)



7. an unreported fire in the containment building suppression chamber indicative that fire-watch and communication are ineffective in that area of the plant; U.S. General Accounting Office, Reporting Unscheduled Events at Commercial Nuclear Facilities: Opportunities to Improve Nuclear Regulatory Commission Oversight, at EMD 79-16 at 3, 13 (January 26, 1979); (12-14-79 Confidential Report at 1-2).

As a legal measure of the implications of Mr. Phillip's default, his misconduct satisfies the requirements for all of the whistleblowing disclosure categories in 5 USC §1206(b). Initially, the omissions violate mandatory legal duties for an NRC investigator. (See pp. 5-7, supra)

The omissions also constitute "mismanagement," defined 5 CFR §1250.3(e) (1980) as "wrongful or arbitrary and capricious actions that may have an adverse effect on the efficient accomplishment of the agency mission."

His excuse that the NRC lacks jurisdiction simply was wrong. (See pp. supra) That mistake alone satisfies the first half of the definition. Alternatively, both misapplication of the law and failure to consider relevant facts constitute arbitrary and capricious action. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Supra v. Federal Aviation Administration, 589 F.2d 307, 311 (7th Cir. 1978); Keco Industries, Inc. v. United States, 203 Ct. Cl. 566, 452 F.2d 1200 (Ct. Cl. 1974); Antilles Indus., Inc. v. Government of Virgin Islands, 388 F. Supp. 315 322 (D. St. Croix V.I. 1975).

The error in judgment interferes with the efficient accomplishment of the NRC mission in two respects. On the most basic level, Mr. Phillip's exclusion of relevant evidence prevented the NRC from pursuing its mission of enforcing its own rules and regulations for safe, efficient construction of nuclear plants. 42 USC §2035(c). (See pp. supra) More specifically, by his action he impeded an intricate interagency enforcement process for referral of criminal allegations to law enforcement authorities. 44 FR 75535. (See p. supra.)

Similarly, the exclusion represents "abuse of authority," defined in 5 CFR 1250.3(f) as "arbitrary or capricious exercise of power by a Federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons." As seen above, it was arbitrary and capricious to ignore relevant facts by misapplying the law. The action benefited

the utility and the construction firm, who are now off the hook. The exclusions discriminated against the public, which remains vulnerable to the dangerous abuses at Zimmer.

Mr. Phillip's action perpetuated "gross waste," defined in 5 CFR §1250.3(d) as "unnecessary expenditure of substantial sums of money, or a series of instances of unnecessary expenditures of smaller amounts."

Cost overruns and construction delays already have saddled CG&E with millions of dollars in inflation penalties and interest due on its construction financing. CG&E ordered the Zimmer plant in 1969 for an estimated cost of \$240 million, with completion date set for 1975. Recent estimates have put the cost somewhere over \$1 billion, and the plant will not go on line before late 1982. (August 31, 1980 interview with journalist Mark Hertsgaard) ("Hertsgaard interview").

CG&E customers already pay for this non-operative plant in their monthly utility bills. In addition, CG&E has filed a controversial request for a new rate increase to offset the cost of construction delays.

Mr. Applegate's disclosure goes a long way toward explaining delays and cost overruns. For example, a full examination of his charges would be highly relevant for utility commission decisions on rate hikes. Surely the ratepayers shouldn't subsidize the thriving underworld existing under CG&E's nose (as well as the NRC's) at Zimmer. In short, the public interest demands that the issues raised by Mr. Applegate's disclosure be pursued fully. Mr. Phillip turned a deaf ear to that demand.

Finally, the omission perpetuated a "substantial and specific danger to public health or safety." 5 USC §1206(b). Nuclear power plants rely on an extremely dangerous technology. The slightest mistake - human, structural, mechanical -- could lead to disaster. Obviously, the public safety is compromised when those who build the plant are drunk, or when the fire alarm system is inadequate. It also threatens public safety when security is so loose that black market manufacturing, smuggling and sales operations thrive in the plant. If it is possible to divert nuclear steel and smuggle cut copper wiring, it may be possible to do the same with nuclear fuel. Vulnerability to sabotage and blackmail is of the utmost concern to the public. Unfortunately, Mr. Phillip deemed those issues irrelevant.

II. MISMANAGEMENT, ABUSE OF AUTHORITY, PERPETUATION OF GROSS WASTE, AND PERPETUATION OF SUBSTANTIAL AND SPECIFIC DANGER TO PUBLIC HEALTH OR SAFETY, BY MR. PHILLIP THROUGH FAULTY INVESTIGATIVE TECHNIQUES.

Mr. Phillip's investigation failed on parallel levels: not only did he ignore relevant issues within NRC's jurisdiction, but his methodology in researching the remaining issues was incomplete and one-sided. On the significant issues covered, the report is little more than the utility's version of the facts. It pales in comparison with other objective, thorough NRC reports.

There is a well-developed body of legal guidance and authoritative recommendations for the conduct of NRC investigations. Investigators are authorized to administer oaths and subpoena documents, 42 USC §2201(c), and to consult workers in order to perform effective and thorough investigations. 10 CFR 19.15(a). The General Accounting Office has recommended that NRC investigators contact workers, since craftsmen building nuclear plants can provide valuable information on the quality of construction work. Report to the Congress by the Comptroller General of the United States, U.S. General Accounting Office, the Nuclear Regulatory Commission Needs to Aggressively Monitor and Independently Evaluate Nuclear Power Plants Construction (EMD 78-80 at 7 (September 7)) ("EMD-78-80").

Investigators even are authorized to expand their investigations beyond the matters raised by complaints, in order to fully investigate the issues raised. 10 CFR 19.16(b) (1980). GAO recommends this practice, having found that reports too often are unduly limited in scope and detail. supra. (EMD-78-80, at 22.)

Mr. Phillip ignored these authoritative guidelines. On the most basic level his report simply presents the management side of the dispute. For example, he failed to talk with many witnesses who would have verified Mr. Applegate's allegations. And for those people he questioned, Mr. Phillip's report makes no reference to his authority to take sworn affidavits and subpoena relevant documents. These steps would have made witnesses accountable for their assertions.

Phillip basically restricted his contact to members of corporate management at the Zimmer facility. (NRC Report, at 5.) Several of the CG&E officials he contacted were themselves the targets of Applegate's charges. Others had nothing to contribute. But Phillip ignored employees who could have verified the allegations and expanded on the disclosure.

Two CG&E officials Phillip contacted were intimately familiar with Mr. Applegate's charges; Mr. Schwiers, the Policy Assurance Manager, and Mr. Swain, the Construction



Manager, were suspect of wrongdoing at Zimmer. Plant employees contacted by Mr. Applegate and GAP named Swain as the man most responsible for overruling quality assurance rejections of faulty welds. Further, Schwiers is one of two CC&E officials who denied Applegate permission to pursue his leads on quality assurance deficiencies. Both men had obvious selfish interests in the outcome of this probe. Yet neither was questioned under oath, and the report provides no record of the questions asked.

Only three of the eight KEI officials Mr. Phillip contacted -- Messrs. Marshall, Pallon and Hang -- are significant for Applegate's allegations. Project Superintendent Marshall was not placed under oath, although Applegate charged him with misallocation of funds and mismanagement, including home and automobile repairs at the ratepayers' expense. (Affidavit, at 4-5). Since Mr. Phillip provided no record of questions asked and topics raised, it is impossible to conclude whether those issues were covered by the interview.

Both Messrs. Hang and Pallon played key roles in the dispute about faulty welds, and both have a personal stake in avoiding a full exposure of events at Zimmer. While employed as a PM radiographer, Hang had complained to Applegate that KEI was approving welds that Hang had rejected. When Phillip spoke with Hang, he already had taken a new job with FRI. Pallon was the man at the center of the faulty weld controversy -- he approved the welds PM had rejected. By merely accepting their statements without question, Mr. Phillip may have furthered a suspected coverup of safety defects at Zimmer. (Documentation for these allegations is available upon request, on tapes Mr. Applegate made of conversations with KEI personnel.) ("Applegate tapes")

Self-interest also is an issue in Phillip's contacts with NBS and PM officers, but again he took no sworn statements. NBS was PM's successor at the plant and a competitor. NBS assessments in a probe of welding problems uncovered by PM radiographers could be suspect on grounds of conflict-of-interest.

Similarly, when Phillip came to Zimmer PM already had lost its radiography contract. It would be vaive not to suspect that PM President Ernest Aldredge's responses might be tempered by legitimate fears of reprisal from within a closed nuclear industry. In fact, Aldredge himself had characterized nuclear construction as a "closed industry" in a taped conversation with Mr. Applegate. (Infra, at In the same conversation, Aldredge informed Applegate that PM's parent corporation had ordered the subsidiary to avoid criticism of the Zimmer plant due to fears of industry blackballing. Mr. Phillip was well aware of Aldredge's fears about speaking freely: Applegate played the tape for Phillip. (Affidavit at 21-3.)

TO: Henry PHILLIP  
RTH

FROM: BILL WARD

Phillip never contacted any craftsmen or others referred by Mr. Applegate, either directly or through his confidential reports. Several of these individuals have made statements to OAP representatives. These statements and affidavits are available with proper assurances of confidentiality and the individuals permission.

The significance of this omission cannot be understated. If Mr. Phillip had bothered to talk with the line employees who construct the plant daily, he would have learned the full scope of the problems at Zimmer. For instance, employees referred by Applegate would have discussed the following issues, had Mr. Phillip cared to listen:

1. KEI knowingly installed and ripped out unsuitable main steam relief piping, at an estimated labor cost of \$320,000.
2. 2000 pound fittings were installed in 1979 on residue head valves, although 5000 pound fittings are required.
3. A radioactive waste drain is clogged with concrete which carelessly was poured into the drain.
4. A residue heat valve broke when a pipefitter bumped into it, raising new questions about the quality of metal used for valves.
5. Sensitive parts on welding rods are possibly damaged through storage at improper temperatures, and possibly lost through failure to follow proper paperwork and labelling requirements.
6. Argon gas valves for flushing oxygen from pipes routinely are left open by the day crew, causing the night crew to be overcome by gas, a problem about which CG&E Safety Director Cummings expressed disinterest.
7. Prefabricated piping received in 1977 has defective welds, but construction supervisors told crews not to repair them because the welds were made off-site.
8. At least three sources contacted by Applegate confirmed that an estimated 10% of the plant's prefabricated welds are defective.
9. Engineering "designs" routinely are drawn after the fact to conform with piping that already had been installed.
10. Shock-absorbing electrical tray hangers previously found unsatisfactory are still unsafe due to faulty welds, electrical cable trays remain dangerously full.

11. Sand and mud choke the feedwater pumps and intake flues carrying makeup water to the cooling tower, because of a flaw in the plant's design. Pumps used to rectify the flaw quickly burn out.

12. A design flaw in the heat exchanger control panel permitted an operator mistakenly to force 1200 pounds of pressure through pipes only meant to handle 300 pounds, ripping the pipe and soaking electricians with a hard spray of water that would have been radioactive had the plant been in operation.

13. There have been periods when there were no security surveillance cameras during nuclear fuel deliveries to the core, and perimeter security consisted for an extended period of only a four foot chickenwire fence.

14. A lax attitude toward employee behavior was evidenced by complete disregard of drinking and drug use on the site, and routine hiring of temporary laborers prone to violence.

15. Employees fired for time cheating had been cheating with the express approval of management, and the only time cheaters fired were vocal and knowledgeable critics of plant QA and safety.

16. CG&E had warned PM management to silence the radio-graphers at Zimmer, who were criticizing CG&E's consistent approval of welds rejected by PM.

17. Union pipefitters and PM employees have been intimidated by fear of utility and industrywide reprisals should they complain about QA practices.

18. A KEI employee has kept a detailed journal of safety hazards and incidents at Zimmer.

19. A common "joke" among pipefitters at Zimmer is that they will be undreds of miles away when the plant goes on line, due to their predictions of a disastrous accident.

Many of these charges suggest construction permit violations which were common knowledge among employees. If true, CG&E and KEI may have violated NRC requirements that licensees report deficiencies in safety and construction to CFR 50.55(e)(1)(i) and (iii). Phillip could have learned of these things with a minimum of investigative effort and a promise of confidentiality. In short, the probe was crippled by his failure to look behind the unsworn statements of management representatives -- nearly all of whom had identified conflicts-of-interest -- and to question the workers' behind knowledge.



Mr. Phillip's documentary research and on-site inspections were equally unimpressive. For example, one of the keys to Applegate's allegations is that the radiographers' inability to perform their jobs free from management constraints has tainted the quality assurance program. Even so, Mr. Phillip failed to look beyond the paperwork by performing independent tests or radiographs on any of the pipes and welds in question. Instead, he relied on the documentation and interpretations of officers at NES, CG&E and KEI, all whom have a clear financial stake in the outcome of the probe. GAO has criticized the NRC for not performing independent verifications, calling the practice a barrier to assurances of adequate plant construction. EMD-72-80, at 10.)

Mr. Phillip since has claimed that companies have nothing to gain from cheating on Quality Assurance paperwork, since they risk censure by the public and NRC if caught. But there is little risk of exposure when an investigator ignores most of the relevant witnesses and issues, and is satisfied not to obtain independent verification of management assertions. As a result, the evidentiary omissions constitute mismanagement and an abuse of authority. Further, the omissions perpetuate gross waste and a substantial and specific danger to public health or safety. (Supra, at

Mr. Phillip did not even steadily pursue the limited investigation he conducted. He came to Zimmer after hearing charges of safety deficiencies and coverups. Yet after announcing his investigation and conducting a preliminary review, he left the site for three weeks. (NRC Report, Cover Sheet.) The time gap cannot be justified. Three weeks is sufficient time to alter or destroy Quality Assurance records, to establish a "party line" response on key issues and to silence critics within the organization. As a result, the interruption also constitutes mismanagement. (Supra,

Mr. Phillip's investigative methodology was so flawed that both he and the NRC are in an indefensible position. Not all NRC reports are susceptible to that evaluation. For instance, the South Texas Project investigation, released in April 1980, is an example of detailed reporting on nearly identical issues as those raised at Zimmer -- flaws in quality assurance, intimidation of QA staff, and management complicity. U.S. Nuclear Regulatory Commission Office of Inspection and Enforcement for Region IV. Report No. 50-498/79-15 on the South Texas Nuclear Project (Final Review April 22, 1980). That probe included independent field investigation. The investigators researched broad issues as well as narrow underlying examples. The investigators listed all issues disclosed, and elicited confidential sworn statements. Phillip's effort was shoddy by comparison, and a disservice both to the public and the NRC.

III. MISMANAGEMENT, ABUSE OF AUTHORITY, AND PERPETUATING A SUBSTANTIAL AND SPECIFIC DANGER TO PUBLIC HEALTH OR SAFETY, BY MR. PHILLIP, THROUGH INACCURATE INVESTIGATIVE CONCLUSIONS.

The flaws discussed above are only examples of the substandard quality of the NRC effort at Zimmer. A section-by-section analysis reveals that Mr. Phillip's report on Applegate's charges is packed with misquotations, misrepresentations and faulty conclusions. As a result, the report as a whole fits the definition for all whistleblowing disclosure categories except 'violation of law'... (Supra, at Mr. Phillip's workproduct will only legitimize dangerous, unctoful nuclear plant construction practices.

A. Introductory Summary

On March 3, 1980 Applegate met with Phillip and NRC investigator Williamson. Applegate and Phillip met again the next day. But the report's summary and "reason for investigation" do not begin to summarize the contact Phillip had with the "allegor." The piping weld problem was only one of more than a dozen problems, and each was merely a symptom of deteriorating safety practices throughout the plant. As described above (supra, at the report is totally silent about the charges Phillip ignored for whatever reason. Consequently, his summary of allegations and his disposition is incomplete and misleading.

Additionally, there are direct inaccuracies in the summary. For instance, Phillip stated that the NRC became aware of the allegations against Zimmer after Applegate called on February 28. (NRC Report, at 3.) On that date, Applegate called NRC Chairman Ahearn. In fact, however, the process had begun two weeks earlier on February 15, when Applegate called Inspection and Audit Director James Cummings to lodge his claims. Mr. Applegate called Cummings several more times before giving up in frustration and contacting the Chairman. (The relevant telephone bill for Mr. Applegate's residence is attached as Exhibit 5.) Mr. Cummings received information which he apparently sat on.

Similarly, Mr. Phillip describes the allegor as a private investigator brought in by CG&E to probe "time card padding by site personnel." (NRC Report, at 6.) But Applegate was not only hired to document time padding -- his mission was to find "any possibility of misconduct on the part of anyone involved in the construction of the plant." (Supra, at Phillip refused to recognize the broad base of Applegate's work at Zimmer, thereby undercutting the basis for the reliability of his evidence.

In the same vein, the report asserts that Applegate screened and played "parts of the tapes" for Phillip on March 3. That is simply inaccurate. Mr. Applegate provided all of his evidence to the NRC investigators. It was Phillip who excluded sections, without explaining his reasons to Applegate at the time. (Affidavit at 14.) The coarse quality of the tapes might have created difficulties for Mr. Phillip; they were made surreptitiously with the use of a concealed body recorder in some instances. But Phillip could have arranged the necessary audio work to improve the quality. Applegate himself has undertaken this task, with favorable results. In a reasonable probe of alleged coercion and coverup, these taped conversations would have been invaluable. But Mr. Phillip squandered this vital evidence.

### B. Findings

Mr. Phillip investigated three narrow issues in the Applegate disclosure:

1. Defective welds in safety-related systems have been accepted, among them were welds CY606, HR42 and X811.
2. Five defective welds were identified in prefabricated piping but the pipes were accepted and installed in a safety-related system.
3. The manner in which safety-related installed piping was flushed was inadequate and a scheduled six-week flush was reduced to two weeks.

(NRC Report, at 3.) We will examine his analysis on each issue.

#### 1. Allegation #1.

Mr. Phillip concluded that Allegation #1 was not substantiated by his investigation. Phillip's characterization, however, is misleading. "Acceptance" is a trade term meaning final approval. Applegate charged that unacceptable welds were installed at Zimmer, despite the radiographers' independent recommendations to reject them. (Affidavit, at 7.)

In fact, Mr. Phillip's detailed analysis supports Mr. Applegate's charge. The investigation revealed "unresolved discrepancies" in the records for all three welds. The welds were installed despite these questions, some of which remain unresolved after four years. (NRC Report, at 8.)



Mr. Phillip went beyond inconsistent argumentation and conclusions, however. The investigation was shallow. This superficiality is illustrated by his analysis of the welds in question. He failed to test any of the welds independently, despite charges that the records he examined were misleading and possibly fraudulent. (Affidavit, at 8.) He took NES' evaluations of the records at face value, despite the possibility of conflict-of-interest. (NRC Report at 7-8, infra at

On this questionable basis and a spot check of CG&E's own records, Phillip inferred that PM's performance may have been substandard and that the utility may have rejected more welds as unsafe than did the PM radiographers. In fact, PM rejected approximately 39% of the Zimmer welds, as compared to the industry average. (Hertzgard interview.)

In one instance, Mr. Phillip was content simply to abandon an allegation rather than to learn the truth. A defective weld was located in concrete and possibly dug up for repairs. Instead of resolving the uncertainty, Mr. Phillip dropped the issue. (NRC Report, at

The conclusions Mr. Phillip drew on Allegation #1 were incomplete. For instance, he reported "unresolved discrepancies" in the records for welds HR42 and CY606. (Id., at 8.) Unfortunately, the report stops with this tantalizing hint: weld K311 had been found defective in 1977 and replaced with weld K316. But the new weld never was radiographed after the repair, and Mr. Phillip chose not to pursue the issue further. (Id.)

On another level, employees charged that records might be unreliable because KEI pressured the radiographers to rush the x-rays and perform the tests under imperfect conditions. This "pressure to produce" was likely to produce low-quality radiography. A KEI official's evaluation of PM confirmed the contractor's attitude: "[W]e had lots of welds that needed x-raying, but Peabody was ... slowing down production." (KEI Vice President for Construction and Field Operations, Don Schiberg, quoted in Hertzgard interview.) Phillip never explored the underlying relationship between this production pressure and intimidation of the radiographers. Apparently he was not interested in the NRC requirement that Quality Assurance shall be free from cost and production pressures. 10 CFR 50, Appendix B, Criterion I.

In short, Mr. Phillip disregarded the GAO advice to go beyond the "paperwork" approach to resolving safety disputes at nuclear plants. Even on the paperwork level, he failed to justify his choice of NES' interpretation over PM's initial findings. This arbitrary approach to exoneration is inadequate to protect the public health and safety.

2. Allegation #2.

Mr. Phillip reported that the allegor identified five defective welds in prefabricated piping (NRC Report, at 10.), but Applegate's charge against the plant's prefabricated piping was far more sweeping. He merely had identified five welds as examples of more broad-based allegations. He had passed along the employees' estimate that about 20% of the prefabricated piping contains defective welds. (Affidavit, at 6.) Further, he reported that KEI policy forbids repairing these defects even after radiographic detection. (Hertsgaard interview.)

The factual background highlights the seriousness of the allegation. The incident in question occurred late in the evening of July 3, 1979 -- not in October, as Phillip erroneously reported (NRC Report, at 10.) A shipment of Pullman Kellogg piping was received improperly after business and delivery hours. Contrary to standard procedure, the pipe spools were rolled off the Pullman truck and fell to the ground. PM was instructed to x-ray the pipes to ascertain the damage. The radiographers learned that the drop hadn't damaged the piping. However, the PM x-rays showed that the prefabricated piping was defective on arrival. (Affidavit, at 8.)

KEI disregarded the finding and installed the piping in the Main Steam Relief System, a critical safeguard. In retrospect, KEI offered two reasons for ignoring PM's x-rays: (1) PM's instructions were "to check the pipes but not the welds" (emphasis added) (NRC Report, at 10.) (2) Pullman's inspection sheets showed the pipes were acceptable before shipment. (Id.) In other words, PM was ignored because it took the initiative to expose inaccurate records.

When Mr. Phillip investigated the charge, he merely looked at PM's test results and Pullman's QA records (Id., at 11), an ill-advised strategy given each party's stake in the proceedings. Further, he didn't even disclose both sides of the paperwork. The report includes Pullman's QA stamp of approval (NRC Report, Exhibit D.), but it doesn't contain the documents with PM's original findings. Either Mr. Phillip arbitrarily omitted key evidence and abused his authority in the process, or the records are lost and the utility violated the terms of its license. ZPS-1, FSAR 17.0.1.1, 17.1.17 (1978).

As a result of his probe, Phillip found CG&E in non-compliance with 10 CFR 50, Appendix B, Criterion XV, for releasing the pipes and not using "hold tags." But the evidence suggests that more than a minor paperwork violation was involved. Phillip discovered that the pipes were released

after the QA man felt "some pressure ... from construction to get the spool pieces released." (NRC Report, at 13.) Further, an unnamed CG&E official (who now denies involvement with the incident) ordered the QA Document Control Supervisor to alter the nonconformance report and thereby free the piping for installation before it was declared acceptable. (NRC Report, Exhibit M.)

Surely this finding raised serious questions about the integrity of the QA program at Zimmer. It should have sparked a more intensive investigation. But Mr. Phillip was content to conclude his work by confirming the obvious paperwork violation. He failed to report the nature of the pressure exerted on the warehouseman, or by whom it was exerted. He also failed to analyze the handling of this incident to an analysis of intimidation and coercion against PM. (Infra, at By failing to pursue this lead, Mr. Phillip effectively avoided investigating the whole QA organization at Zimmer.

PM later reinspected the same set of prefabricated pipes at Phillip's request. This time the radiographers ... reportedly agreed with the NES April 28, 1980 tests. (NRC Report, at 13.) However, Mr. Phillip knew or should have known that the allegation on prefabricated piping was based on an interpretation dispute between PM, who x-rayed the welds and rejected them, and Pullman, who shipped the pipes under the corporation's seal of approval. Mr. Phillip also knew that PM had been fired and was under intense pressure to remain silent. Phillip even heard Ernest Aldredge, PM's president, characterize Pullman as another "silencer in the nuclear industry." (Transcript of tape recording of May 6, 1980 conversation between Thomas Applegate and Ernest Aldredge, at 2, attached as Exhibit M.) ("Aldredge transcript") Under these conditions, Mr. Phillip accepted without question PM's shift to the suspiciously conciliatory position that nothing truly had been wrong.

### 3. Allegation #3.

This allegation protests a shortcut from six weeks to two in the flushing, or cleaning, procedure for piping. Phillip reported that the crew foreman on the flush took credit for shortening the time period. (NRC Report, at 9.) Phillip does not reveal, however, that the foreman who was "able to accomplish a job in less time than was expected" (Id.) in fact had quit his job, after four days at Zimmer, in protest over this shortcut. It seems the foreman removed a pile of muck by hand immediately after the piping had been "flushed." After demonstrating the failure of the shortcut, the foreman quit in disgust. (Documentation available through Applegate tape recordings and statements from GEP interviews with Anonymous Witnesses, 1980.)



By May 1980, when Mr. Phillip conducted his investigation, the flushing procedure had been judged substandard twice since January 1979. (NRC Report, at 9.) Phillip's curious claim in the general summary that "problems in this area have been identified and resolved" (*Id.*, at ) was generous, to say the least. When the report was filed in July 1980, CG&E's noncompliance had been excused for 16 months. Phillip apparently decided that the allegation need not be pursued, because retesting tentatively was set for Summer 1980. (*Id.*) Since CG&E had been unable to pass an inspection for so long, at a minimum Phillip should have recommended that the NRC monitor the summer flushing procedure.

#### 4. Additional Allegations.

These allegations focus on the harassment and retaliation against PM, referred to above on May 6, 1980, subsequent to the NRC visits to Zimmer. Applegate recorded conversations with three individuals from PM management. PM had been "blown off" a job for the first time in its corporate history. In the taped conversations, PM officials, including M. Aldredge, confirmed that the radiographers had been fired for pushing too hard on safety violations. Mr. Aldredge also confirmed a break-in and theft of quality control records at the PM trailer. Most significantly, Aldredge emphasized that he could not criticize the utility publicly, or PM would be "blow-balled" within a month.

In fact, Aldredge was concerned that his company might be driven to bankruptcy if it stood up to the utility. (Aldredge transcript, at 1-3.)

After listening to this taped conversation, Mr. Phillip spoke with Aldredge. Aldredge now found nothing wrong. He reported that his firm had not been forced to accept faulty records. Of course, contrary to Phillip's characterization, Mr. Applegate did not claim that PM was pressured to accept bad records (*Id.*, at ). Rather, he charged that PM was being pressured to remain silent about all the overrides of the radiographers' rejections.

Aldredge's contradiction with the earlier tape was predictable. In the tape Aldredge explained why he had to deny that B&I and CG&E had applied improper pressure to obtain quality assurance records, for example. But Mr. Phillip accepted the shift in position at face value in the report.

If there were any doubt, a time-line chronicle to PM's final months at Zimmer reveals how Phillip's "see no evil" conclusion overlooked the obvious:



1. December-January 1980: Applegate tapes conversations with pipefitters and radiographers who tell him that PM has been threatened with loss of contract unless they stop complaining about corporate acceptance of faulty welds. (Applegate tapes.)

2. January 1980: There is a mysterious breakin at the PM trailer on the site, and records of controversial welds are pilfered. (Aldredge tape, at 3.)

3. March 1, 1980: PM receives notice of contract termination. The company has never lost a contract before. (Affidavit, at 17.)

4. April 1, 1980: PM leaves the Zimmer site, returning all records to KEI during an unceremonious and hurried transfer of data. Aldredge later characterized the documents transfer as "the fastest transferring of data I can recall." (Aldredge transcript, at 3.)

5. April 7-8, 30, May 1-2, 1980: NRC reviews records at Zimmer and speaks with management. (NRC Report.)

6. May 6, 1980: Applegate records conversations with PM President Aldredge and two other PM managers. The PM executives clearly acknowledge the coercive nature of the industry as the reason for the firm's silence throughout the investigation. (Aldredge transcript, at 1-3.)

7. May 8, 1980: Applegate contacts Phillip with new evidence of coverup and coercion. Applegate plays the tapes made only days before. (Affidavit, at 22.)

8. May 20, 1980: Phillip contacts the individual executives who were recorded on May 6. They deny being pressured to approve bad welds. (NRC Report, at 15.)

If this chronology and Aldredge's admissions were not enough, Applegate also provided tapes by KEI and PM employees documenting the threats. The conversations took place before the fire. In fact, the workers predicted the reprisals that occurred. PM workers had been told by the QA supervisor to "do what we were told when we were told to do it" or they would lose their jobs. (Applegate tapes.) Mr. Phillip does not acknowledge the evidence in his report.

On Phillip's suggestion, Applegate played the May 6 tapes for Phillip and Mr. Buckley of the Chicago FBI office. Phillip reports that Buckley concluded the tapes "did not appear to him to be evidence of criminality." (NRC Report, at 14.) However, Buckley's memory of the meeting conflicts with Phillip's account. Buckley since has explained that he felt himself an inappropriate arbiter of this dispute. (September 16, 1980 conversation between GAF staff assistant Rachel Bellis and Buckley.)

Phillip's characterization of Buckley's response also conflicts with the public record of the meeting. On the record, Buckley stated that the FBI might investigate and prosecute if requested by the NRC. (Giordano, "FBI Shifts Charges to NRC," Cincinnati Enquirer, May 9, 1980.) Phillip improperly dismisses Buckley's evaluation as the final rejection of the NRC allegation. In fact, Buckley was stating that the NRC would have to do its job before he could do his.

### VERIFICATION STUDY

Due to the serious nature of Mr. Applegate's charges, GAP conducted an unusually thorough verification study to determine the reliability and accuracy of his disclosure. Law enforcement officials from the local to the national level have confirmed Applegate's credibility as an investigator. Journalists and reporters who conducted their own verification studies of Mr. Applegate's initial charges have confirmed the accuracy of his facts. GAP has conducted numerous confidential interviews with Zimmer employees who corroborated faces behind the charges. Mr. Applegate's landlady even has confirmed that she and Mr. Applegate have been threatened with physical violence. Finally, Mr. Applegate himself has provided more than enough facts and supporting evidence -- tape recordings, investigative field reports, sworn statements -- to enable a reasonable person to conclude that these serious charges are accurate.

GAP does not undertake permanent representation of any client before receiving approval from its Whistleblower Review Panel. The Panel is composed of two well-known government whistleblowers, Dr. Fred Greenhut and Dr. Tony Morris; a public interest attorney, Andra Oakes, Esq.; and a former Administrator of GAP, Ms. Marjorie Bernard. On November 20, 1980 the Review Panel unanimously concluded that Mr. Applegate's charges are based on a reasonable belief, and approved GAP's representation and called for a full investigation of his allegations.

### CONCLUSION

In our opinion, the citizens of Cincinnati are still waiting for the NRC to do its job. In a month's undercover work, Applegate was able to find widescale theft, drunkenness, black market operations, widescale faulty piping in key safety systems, fire hazards and brutal retaliation against the most quality-conscious employees at the plant. In approximately a month's verification study, GAP was able to confirm Mr. Applegate's assertion that his disclosure represents only the tip of the iceberg -- there may be over a dozen additional

safety defects at Zimmer that threaten the public. In short, Mr. Applegate's prediction that Zimmer is "another Three Mile Whiting to occur" (Affidavit, at 24) may be frighteningly accurate.

By contrast, Mr. Phillip's approach to his task served to contain the scandal, rather than uncover the full story. Contrary to GAO guidelines, Phillip "investigated" by asking management for its side of the story and then accepting the denials nearly at face value. Phillip even ignored the bulk of the evidence Applegate provided at the start of the process.

The results were predictable. With all the resources of the U.S. government, Mr. Phillip was only able to find a single paperwork violation. His investigation and report are a caricature of effective regulation. Unfortunately, the job is on the citizens of Ohio.

Respectfully submitted, .

Rachel Bellis  
Staff Assistant

Thomas Devine  
Associate Director

Louis Clark  
Director



NUCLEAR REGULATORY COMMISSION  
REGION III  
799 ROOSEVELT ROAD  
GLEN ELLYN, ILLINOIS 60137

April 10, 1979

MEMORANDUM FOR: Dudley Thompson, Executive Officer for Operations Support, IE

FROM: James G. Keppler, Director

SUBJECT: ERRONEOUS STATEMENTS PROVIDED BY APPLICANT AT ZIMMER ACRS SUBCOMMITTEE MEETING (AITS F30488H6)

Enclosed for your information and action is a summary statement relative to erroneous information provided by Cincinnati Gas and Electric Company to the ACRS during an ACRS Subcommittee Meeting on February 27, 1979. As we view it, the following points are pertinent:

1. The applicant clearly made false statements to the ACRS Subcommittee. After agreeing with NRC inspectors that this information was incorrect, the applicant failed to correct the false information during the subsequent ACRS Full Committee Meeting after indicating he would do so.
2. ACRS meetings do not involve sworn or notarized testimony. While we consider misleading the ACRS to be a matter of serious concern, we question our enforcement capabilities in this regard.
3. The applicant is meeting the minimum staffing requirements outlined in ANSI 18.1. The misinformation relates to commitments over and above these minimum staffing requirements.

Consistent with the above, we have the following recommendations and questions:

1. ELD, ASLB and ACRS should be informed of this matter (NRR was informed prior to the ACRS Full Committee Meeting).
2. An evaluation should be made as to whether this misinformation constitutes "material false statements."

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PDR



3. We have not pursued with licensee management why they did not clarify the misinformation at the Full Committee Meeting. Should we confront management as to why the false statements weren't corrected? Should we conduct an official investigation including signed statements?

If you desire further information relative to this matter, please contact me.

*Charles E. Nowlin*

*for* James G. Keppler  
Director

Enclosure:  
As stated

cc w/encl:  
N. C. Moseley, IE  
H. D. Thornburg, IE

STATEMENT OF FACTS REGARDING ERRONEOUS INFORMATION  
GIVEN BY APPLICANT AT ZIMMER ACRS SUBCOMMITTEE MEETING

The Advisory Committee on Reactor Safeguards (ACRS) held a subcommittee meeting on February 27, 1979 to review the application of the Cincinnati Gas and Electric Company (CG&E) for a license to operate the Wm. H. Zimmer Nuclear Power Station, Unit 1. During the course of this meeting, the Station Superintendent, in response to questions from the ACRS, provided information on the capability of the utility to provide adequate back-up personnel for key positions in the event of a resignation, prolonged illness, etc.

It was stated that CG&E is now developing the back-up capability within the staff by designating alternate members of their station technical staff to act as backup to maintenance, operations, and other key second-line supervisory positions. This was being done to avoid a situation similar to one they had recently experienced --- loss of the maintenance supervisor who they have had difficulty replacing. According to CG&E, these designated personnel would have the same training as the primary personnel, but not necessarily the immediate experience. Individuals are assigned on a one-to-one relationship as a second-line assistant to the principal, with no other function. The applicant noted that, while this capability is being provided, they had not committed to these actions with the NRC staff.

In the course of reviewing the applicant's program for Preoperational Testing, NRC inspectors had expressed concerns regarding the adequacy of station staffing and, because of these concerns, have followed the status of station staffing closely over the past year. The applicant's statements at the ACRS Subcommittee Meeting appeared to be contrary to our knowledge of the station staffing.

As a result of these apparent contradictions, these statements were discussed with the Station Superintendent during an inspection the week following the ACRS Subcommittee Meeting. The station superintendent stated that there was presently no formal staff contingency plan as described at the Subcommittee Meeting. The station superintendent stated that he would discuss clarification of these statements with his management prior to the ACRS Full Committee Meeting. At the Full Committee Meeting on March 9, 1979, however, the applicant provided no clarification of his earlier statements with regard to staffing.



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D. C. 20555

A-3

MAY 02 1979

MEMORANDUM FOR: James G. Keppler, Director, RIII

FROM: Dudley Thompson, Executive Officer for Operations Support, IE

SUBJECT: APPARENT FALSE STATEMENTS BY APPLICANT AT ZIMMER ACRS SUBCOMMITTEE MEETING (AITS F30488H6)

In your memorandum of April 10, 1979, (enclosed) you advised IE:HQ that the Zimmer station superintendent had apparently provided false or erroneous information to the NRC - initially to an ACRS Subcommittee meeting on February 27, 1979, and subsequently to an ACRS Full Committee meeting on March 9, 1979. We understand that an NRC inspector was present during both ACRS meetings and that transcripts of both proceedings are available to you. We also understand that the station superintendent, Zimmer Nuclear Power Station, when interviewed during an inspection in early March 1979, admitted that the information provided the ACRS Subcommittee was untrue, indicated that it would be corrected at the Full Committee meeting, but failed to do so.

The foregoing was discussed with Mr. Charles A. Barth, Attorney, Hearing Division, ELD on April 30, 1979 who has been involved with the licensing hearings regarding Zimmer. Mr. Barth feels that an investigation of this matter is clearly warranted. Barth pointed out that not only does it raise some question regarding the accuracy of information provided NRC by the applicant, but that the issue involved - the general topic of operator qualification - is of particular interest to the NRC. He further recommended that ASLB, ACRS and NRR be advised both of the content of your memorandum and receive copies of your report of investigation. This matter was also discussed with Mr. Roger Fortuna, OIA, on April 30, 1979, who indicated that his Office would review your report for possible evidence of criminality such as violation of 18 USC 1001.

We share Mr. Barth's opinion and recommend that RIII conduct a full investigation of this matter. Signed statements should be obtained from the NRC inspectors who attended the ACRS meetings and those who interviewed the station superintendent during the inspection where his ACRS testimony was discussed. The interview of the station superintendent should, if possible, result in a written statement from him describing both his reason and motivation for making the

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PDR

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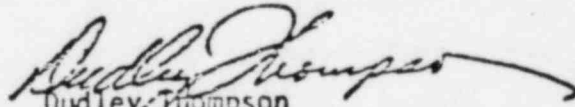
James G. Keppler

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MAY 02 1979

statement. Upon completion of your investigation, we will take care of providing copies of your report to interested offices at Headquarters.

The above information was discussed with Chuck Norelius on May 1, 1979. Please feel free to contact either Bill Ward or Pete Bací of my staff if you need any additional information.

  
Dudley Thompson  
Executive Officer for  
Operations Support, IE

Enclosure:  
Memo JGKeppler to DThompson  
dtd 4/10/79

cc w/enclosure:  
C. A. Barth, ELD  
R. A. Fortuna, OIA  
G. R. Klingler, ROI  
N. C. Moseley, ROI  
H. D. Thornburg, RCI  
J. R. Yore, ASLB  
M. W. Carbon, ACRS  
H. R. Denton, NRR



THE CINCINNATI GAS & ELECTRIC COMPANY



May 18, 1979

E. A. BORGMANN  
VICE PRESIDENT - ENGINEERING

James G. Keppler  
Director  
United States Nuclear Regulatory Commission  
Region III  
799 Roosevelt Road  
Glen Ellyn, Illinois 60137

Dear Mr. Keppler:

I am writing you concerning our telephone conversation of May 14 during which you indicated that Region III wished to interview some of our people further with regard to certain statements made to the Advisory Committee on Reactor Safeguards (ACRS). These statements apparently concerned our staffing plan and some conflict between the statements made and our actual staffing intentions. Obviously, I was quite concerned and looked into the matter promptly. The facts in this matter from our standpoint are as follows:

Following the subcommittee meeting, Mr. Harpster, your inspector, along with his supervisor, Mr. Warnick, telephoned Mr. James R. Schott, our plant superintendent, and voiced his feelings to the effect that CG&E's plans with respect to backup personnel should be clarified at the full ACRS meeting. Mr. Schott advised Mr. Harpster that he had not seen the transcript but indicated that he had not tried to mislead anyone with his testimony.

After Mr. Harpster's call to Mr. Schott, we reviewed the transcript of the ACRS subcommittee meeting of February 27 and concluded that we agreed with Mr. Schott's testimony concerning backup capability. Apparently any problem stems from the discussion of backup to operating personnel between Subcommittee Chairman Bender and Mr. Schott. In essence, Mr. Bender was trying to assure himself that adequate backup would exist for each key supervisor. The maintenance supervisor was used as the example in the discussion which was prompted in part by the fact that our former maintenance supervisor had resigned.

What Mr. Schott stated was that backup capability would be assured at the second line supervisory level and would be full time. Our intention is to have a dedicated backup for each of the following sections: operating, maintenance, I & C, rad-chem, technical, and training. It was not our intention, however, to

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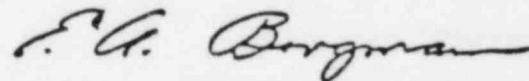
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necessarily give these backup personnel the title of "Assistant" per se.

Both CG&E and Mr. Schott personally believe that our intentions were clarified at the full committee meeting by describing the roles of the maintenance engineer and the other supervisors, including their support. This was done through the use of a view graph and Xerox copies of the plant organization chart which were distributed to members of the committee. It was not until your call that anyone at CG&E had knowledge that this matter had not been fully resolved to Mr. Harpster's satisfaction.

I hope this letter now resolves this matter to the satisfaction of Region III. However, in the event you wish to discuss the subject further with our personnel, we will be pleased to cooperate. As you know, the pre-hearing conferences are scheduled for May 21-23 with the evidentiary hearing scheduled to begin on June 19. For this reason, timely resolution of this apparent misunderstanding is essential.

Very truly yours,



E. A. Borgmann  
Senior Vice-President