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May 27, 1997

Mr. David Meyer
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Mail Stop: T6D59
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: "Safety Conscious Work Environment"
Request for Public Comment
62 Fed. Reg. 8,785 (February 26, 1997)

Dear Mr. Meyer:

We submit the following comments in response to the Nuclear Regulatory Commission's (NRC or Commission) request for comments regarding the Commission's proposed safety conscious work environment requirements. These comments are filed on behalf of Commonwealth Edison Company, Nebraska Public Power District, Rochester Gas & Electric, and South Carolina Electric & Gas Company. These comments are intended to supplement the comments filed by the Nuclear Energy Institute.

I. SUMMARY

Among the "several strategies" proposed in the *Federal Register* is an expansive, unprecedented rule that all power plant licensees maintain a workplace culture in which employees feel free to raise safety issues. Under the proposal, should an employee merely "perceive" that he or she is not fully free to raise safety issues, a safety-conscious workplace may not exist and the licensee will be at risk of enforcement action. We urge the Commission not to adopt any such requirement.

Specifically, the request for comment proposes a rule providing that licensees "shall establish and maintain a safety-conscious work environment in which employees are encouraged to

I+D-11 Budget Materials

raise safety and regulatory concerns, and where such concerns are promptly reviewed, given priority based on their potential safety significance, and appropriately resolved with timely feedback to the originator of the concern." Proposed Rule 50.x(a) (62 Fed. Reg. at 8,790). Under the rule, should the NRC determine that a licensee has failed to "establish and maintain a safety-conscious work environment," the NRC could take any of a number of actions, including enforcement action. Proposed Rule 50.x(d).

We strongly oppose such an initiative. In our view, the NRC cannot with any degree of precision differentiate between a safety-conscious and a non-safety-conscious workplace. Instead, with its combination of a sweeping performance requirement and generalized "attributes" of a safety-conscious workplace (see Proposed Rule 50.x(a)(1)-(5)), the proposal if adopted would inevitably lead to an unnecessary enforcement-based approach. Consistent with past history, the enforcement-based approach would undoubtedly lead to numerous violations for isolated incidents, issues, or failures that may have little to do with the overall work environment.

In addition, given such enforcement exposure, nuclear plant management will inevitably be chilled from taking proper personnel and other actions. More specifically, if there exists the risk that the NRC will deem that a workplace is not safety conscious where one or more employees "perceive" that they are not being "encouraged" to raise concerns or that their concerns are not being addressed as quickly as they might like, licensee managers will be forced in all aspects of decisionmaking to factor in the perceptions that their decisions might create. At every turn, licensee management will be forced to make decisions not based primarily on actual safety considerations, but on perceptions that might be created. Such a situation would indeed undermine, not enhance, safety.

Much of the Commission's request for comments addresses a proposal to "standardize" the NRC's own approach for "dealing with situations" (62 Fed. Reg. at 8,786) in which NRC-defined criteria indicative of a safety-conscious workplace are not met. To the extent that the Commission already has the authority to issue orders and take enforcement actions designed to foster a safety-conscious workplace, we do not disagree with the concept of standardization of the Commission's options, *per se*. In fact, standardization may very well foster consistency and predictability, so long as the set of standards prescribed is complete. However, an open-ended set of options (as is being proposed) is not "standardization" at all. And a set of options that permits enforcement action for isolated instances that are alleged to be indicative of broad problems is simply not appropriate.

In addition, standardization of the staff's options for dealing with such "situations" would—due to the lack of any significant regulatory experience in this area—be premature and likely to result in a faulty set of options. We strongly believe that any attempt to "standardize" either (1) the criteria supposedly indicative of a safety-conscious workplace, or (2) the tools licensees are

expected to use to build a safety-conscious workplace (*e.g.*, a "holding period") would be ill-advised. The Commission should not mandate or define a safety-conscious work environment through the guise of "standardization" of corrective actions.

In addition to the problems inherent in the proposed "strategies," a new rule requiring a safety-conscious workplace is simply not warranted. We believe that every reactor site today is characterized by safety-consciousness. The industry's strong and still-improving safety record leaves no doubt that safety is, indeed, the priority at every plant. While the failure of a licensee to effectively process employee concerns might jeopardize safety-consciousness at a particular site, such problems have been manifested as isolated events (to which the Commission's employee protection provisions already apply, *e.g.*, Section 50.7) or as a more expansive problem at only a very few sites (Millstone is the only "problem" site identified in the request for comments). The NRC already has the necessary tools to address such problems when they occur. The industry has taken great strides in the past ten or so years to improve their work environments, and licensees currently are very much aware that maintaining a safety-conscious work environment is essential. The Commission's proposal is not needed to send a "signal" to licensees.

Achieving a safety-conscious workplace is a good idea that calls for management awareness and sensitivity. Such a culture cannot be imparted by regulation, especially by prescriptive proposals such as some of the strategies now under consideration or by an intrusive compliance-based approach. We urge NRC not to implement any of the strategies proposed.

II. COMMENTS

A. The NRC Has Not Demonstrated Any Need for the Proposed Strategies

The lack of a "safety-conscious work environment" at any Part 50 facility is anathema to the common goal and priorities of NRC and licensees to assure public health and safety. The industry's impressive safety record over the last few decades speaks for itself. At every site at every utility, every day, safety is and always must be the top priority.

In light of the industry's record of safety-consciousness,[1/] and particularly in light of the numerous measures that licensees have implemented in the past ten or more years to ensure that employees feel free to report safety issues, any contention that a significant or even measurable

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1/ Last year, Chairman Jackson stated that "NRC performance indicators show that the safety and reliability of U.S. nuclear power plants have improved over the last 10 years." Letter from S. Jackson to E. Markey of March 27, 1996, at 2.

"problem" exists with regard to safety-conscious work environments is without foundation. Certainly there are isolated cases of discrimination at certain plants but there is no indication that the NRC has not been able to deal effectively with these problems. To the contrary, the NRC has developed and refined a complete set of processes by which the agency handles employee concerns problems, ranging from its broad enforcement powers to requiring oversight boards. Not only does the NRC have the necessary tools to react effectively to a licensee problem, it *has* acted effectively.[2/]

The Government Accounting Office (GAO) just completed a comprehensive study of nuclear industry "whistleblower" matters. "Nuclear Employee Safety Concerns: Allegation System Offers Better Protection, but Important Issues Remain," March 1997 (GAO/HEHS-97-51)(GAO Report). That report contains nothing indicating the need for any of the strategies now under consideration. To the contrary, the report is supportive of the initiatives that the NRC has already implemented:[3/]

> [B]oth NRC and [the Department of Labor] have taken actions intended to improve overall management of the [allegations] system, such as establishing procedures to improve communication and feedback among employees, NRC, and licensees. [The NRC] has also increased its involvement in allegation cases through several actions, including investigating a greater number of allegations.

GAO Report at 3. The report concludes that the actions already implemented "should improve monitoring of the process, increase NRC involvement, and augment licensees' responsiveness to employee concerns." *Id.* at 27. While the Report also recommends that the NRC work to improve its "knowledge of the work environment at nuclear power plants" (at 28), the Report contains no suggestion that any of the strategies now being considered are necessary.

In fact, the nuclear industry is far ahead of other industries with respect to efforts made and successes achieved in creating safety-conscious work environments and protecting employees who raise safety concerns. Prominent attorneys who represent whistleblowers have acknowledged that the nuclear industry is by far the most progressive of industries on these issues.

2/ We do not suggest that the NRC in fact has the legal authority to take any action it pleases to address perceived deficiencies in a licensee's process for resolving employee concerns. In fact, some or all of the "standardized" options set forth in the proposed rule appear to be far beyond the scope of the NRC's authority.

3/ The report was less positive of the Department of Labor's (DOL) ability to process Section 211 claims quickly. DOL has, however, implemented procedural changes that promise to improve the timeliness of resolution of Section 211 claims.

This progressiveness is a direct result of the emphasis that nuclear licensees and NRC, through numerous programs, have placed on their employee relations and workplace environment, especially over the past few years. We are aware of no other regulator that imposes "safety-consciousness" as a regulatory requirement, and the nuclear industry above all others does not need such a mandate.

The justifications for further initiatives by the NRC set forth in the request for comment are unusually thin. As the primary justification for additional regulatory "strategies," the *Federal Register* notice cites the recent events at Millstone and unspecified allegation data: "[T]he findings of the Millstone Independent Review Group (MIRG) and compilation of industry-wide allegation data suggest that not all licensees are successful in maintaining a safety-conscious workplace." 52 Fed. Reg. at 8,786. The employee concerns problems at Millstone, however, are not at all the norm—in fact, Millstone is the exception that proves the rule. Further, the NRC has addressed the Millstone circumstances with a site-specific order requiring oversight of the employee concerns resolution process.

Moreover, the "compilation of industry-wide allegation data" produced by the AEOD provides no indication of any significant problems. First, the number of allegations received by the NRC in itself does not indicate any problem with "safety-consciousness." The NRC has itself conceded on many occasions that the allegations data is not conclusive of anything. Thus, allegations data and other indicators on which the NRC has focused are subject to various interpretations. For example, what conclusions can be drawn from the fact that a licensee's employee concerns program receives a high number of allegations, or sees an increasing trend? Are those concerns nuclear safety issues? Personnel issues? Moreover, while an active employee concerns program could suggest that issues are not being effectively resolved within the chain of command, an active program could just as likely indicate that employees are willing to raise issues repeatedly and through a variety of internal avenues, and could thus evidence that the program is effective and that the environment is one in which workers feel free to raise safety issues.

Second, while as a mathematical certainty some sites will always have a greater-than-average number of employee allegations, sites with an unusually high number of allegations are few

and far between.[4] Thus, if the number of allegations points to any "problem," such problems are isolated. There is no indication that this is a current, industry-wide problem.[5]

Virtually all licensees already have effective programs in place to foster a safety-conscious work environment. They have implemented effective and in many cases redundant mechanisms for resolving management/worker disputes. Apart from the programs unique to the industry, such as independent quality assurance organizations and employee concerns programs, many licensees utilize effective and state-of-the-art human resource problem solving mechanisms, including internal appeals processes and, particularly in unionized environments, grievance and arbitration mechanisms. In addition, nearly all licensees have extensive training programs that sensitize supervisors and managers to the need to resolve employee concerns in a constructive manner.

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[4] For example, for multiple-unit sites in FY 1995, twenty-six of the thirty-seven total licensees had an average number of allegations (eleven) or less. Eight licensees had allegation counts between twelve and twenty-two. Three licensees skewed the average with thirty-two, forty-seven and fifty allegations respectively. Indeed, *twelve licensees had allegation counts below five*. AEOD/E96-02, Supplement 1, "Engineering Evaluation Report Analysis of Allegation Data," June 1996.

Similarly, in FY 1996 forty-five of the seventy total licensees had an average number of allegations (thirteen) or less. Five licensees with thirty-four allegations or more skewed the average, including one licensee (Millstone) with seventy-six allegations. *Twenty-five licensees had allegation counts below five*. NRC Division of Technical Support, May 6, 1997.

[5] The NRC's own review of allegations data indicates that there is no clear correlation between a high number of allegations and the need for regulatory corrective action. Specifically, although SECY-97-006 identifies four sites as having a "trend" in allegations meriting review by the staff (St. Lucie, San Onofre, Salem, and Watts Bar), the staff's conclusion as to each site was that no further action was needed (other than further discussions with one of the licensees). "Followup to the Annual Report on Allegations and Responses to Recommendations of the Millstone Independent Review Group," SECY-97-006 (Jan. 7, 1997). Thus, plants that today have "high" allegations numbers do not necessarily lack safety-conscious workplaces requiring NRC action. Notably, in reviewing the allegations data, the staff conceded that "analyses of raw allegation data alone had significant limitations, which made it difficult to draw inferences regarding a given facility or to make comparisons between plants" (*id.* at 3).

None of the "strategies" under consideration, whether a new rule or a new policy statement, is needed to send a signal to licensees. 62 Fed. Reg. at 8,787. In 1997, licensees well recognize that their human resources are their most valuable asset and are the primary link for assuring safety. Licensees are also fully aware that a wide variety of factors—depressed morale caused by downsizing, personality conflicts, ineffective supervisory or management styles, and so on—can weaken worker resolve to contribute fully to plant operations. And, as noted above, because they are fully aware that influences that inhibit an employee's willingness to report and help resolve safety issues are not acceptable, licensees have implemented a variety of programs to address these issues. In sum, none of the proposed "strategies" are warranted.

B. The Proposal is an Unproductive Attempt to Regulate Perceptions

The request for comments states that "the perception of discrimination . . . may be more important than whether discrimination actually occurred" (62 Fed. Reg. at 8,766). While the NRC, for better or worse, already has a mechanism in place to penalize licensees for *discrimination* occurring at their plants (Section 50.7), it is bad policy, and in fact impossible, to attempt to broaden the regulatory sweep to regulate, especially in a prescriptive manner, individual plant workers' perceptions or the general site "culture." To our knowledge, no other industry is subject to a federal scheme designed, as is the NRC's proposal, to regulate worker perceptions. We strongly oppose any new initiative that would permit the NRC to penalize or take action against licensees based on worker perceptions, a "chilling effect," or "cultural" problems.

In our view, the NRC cannot, with any degree of precision, differentiate between a healthy and unhealthy workplace—the indicators are simply either too subjective or, if objective, not meaningful. The proposal acknowledges that "evaluating the safety consciousness of a licensee's work environment is highly subjective," that "departures from . . . a safety-conscious work environment are not always easy to detect," and that "any one piece of data . . . can be ambiguously interpreted." 62 Fed. Reg. at 8,786. The indecisive wording of the proposed rule confirms that there is a weak relationship, at best, between the identified indicators of a possible problem and the health of the environment. Proposed Rule 50.x(b) ("Indicators that *may be considered* as *possible evidence* of an *adverse trend*") (emphasis added).

If, as we firmly believe, the NRC cannot reliably spot an unhealthy environment, much less emerging trends evidencing a deteriorating environment, then NRC's proposed remedies will be applied essentially indiscriminately—*i.e.*, without relation to whether there is, in fact, a problem at a specific site. A misidentified diagnosis could lead to a situation where the NRC is interfering with a well-run employee concerns program and a carefully-crafted, positive workplace environment by introducing a divisive, adversarial and time-consuming/enforcement element. The proposal, therefore, could well prove counterproductive.

Attempting to change workers' "feelings" about their environment through traditional, compliance-based regulation is ill-advised. Licensee management, not the NRC staff, is in the best position to create a plant-specific, workable regime. The current regulatory structure works by leaving employee concerns management where it belongs—with the licensee management—and by providing the proper incentives to management via the specter of the enforcement process in cases of actual discrimination.

C. The Proposal Would Impede Management's Ability to Maintain Plant Safety

The proposal brings with it the realistic risk that the regulation of perceptions will have a negative effect on plant safety. Given the possibility under the proposal for enforcement for practically any act by a manager that an employee perceives as threatening, nuclear plant management may be chilled from appropriately applying accountability and from taking proper personnel actions, resulting in continuing the employment of safety-averse plant workers who decrease plant safety margins.

Take, for example, the situation in which a control room operator does not perform his job properly and refuses to attend remedial simulator training. His supervisor confronts the operator and an argument ensues in which the operator makes allegations about how the supervisor does his job. An unplanned scene results. The operator believes that his supervisor lacks "an attitude that promotes employee involvement" in raising concerns. *See* Proposed Rule 50.x(a)(1) (identifying "management attitude" as an attribute of a safety conscious work environment). The supervisor decides to fire the operator. Others working in the control room (not knowing of the operator's poor performance) perceive that the supervisor overreacted. Does a safety conscious workplace exist? Should the manager have avoided sending the operator to remedial training, so as to avoid the confrontation and, in turn, the misperception of other workers? Has the licensee violated Proposed Rule 50.x(a)? Further, being upset about his termination and understanding the new holding period policy, the operator alleges retaliation and continues to receive NRC-mandated pay and benefits from the licensee. Investigations then follow, effectively inviting employees to "take sides" in what started as an isolated dispute between one manager and one employee. This, in our view, is not a healthy result.

Management needs to be free to set expectations, enforce standards, and take appropriate personnel actions to maintain the safety of the plant. A regulatory regime that focuses on employee perceptions necessarily will undermine management authority, chill management decisionmaking, and in the end is likely to be destructive of workplace order and morale. The Commission's proposal will impede management's ability to make hard decisions to suspend or terminate unsafe plant workers, thus potentially *decreasing* the safety margin at the plant. We

believe that, instead of increasing plant safety, the Commission's proposal will result in safety margin decreases.

D. The Proposal Will Lead to an Excessive Compliance-Based Approach to Regulation

As alluded to above, the proposal is too prescriptive and compliance-based, and would lead to an unnecessary enforcement-based rule. Under Proposed Rule 50.x(d)(5), enforcement action could be taken any time the NRC staff calls into question whether some circumstance or event caused the licensee's work environment to be something other than "safety-conscious." Enforcement action could be taken any time some isolated incident appears to run contrary to one of the proposed "attributes" of a safety culture. The proposal forces licensees and the NRC to focus on compliance issues. History with NRC's enforcement program, even with the so-called performance-based maintenance rule, teaches that enforcement will focus on specific issues and incidents—not on the overall purpose of the rule.

Predictably, enforcement would go much further than enforcing specific program attributes. Investigators inevitably will focus on individual employee-manager relationships and specific incidents. The new proposal could invoke the full enforcement authority of the NRC anytime a gruff supervisor has an argument with an employee, precisely because the threshold for NRC action is so subjective. The primary way in which the NRC will likely enforce the new proposal will be to seize on discrete individual acts because the standard for intervention is so loose. Given the specter of the NRC's "deliberate misconduct rule" (10 C.F.R. § 50.5), this scenario becomes even more troubling.

If adopted, the proposal would misdirect resources away from the "big picture" goal of establishing a non-adversarial employee concerns program. It would invoke adversarial, enforcement-based solutions that interfere with the proper execution of licensee-established employee concerns programs and non-adversarial dispute resolution mechanisms. For this reason as well, none of the strategies being considered should be adopted.

E. The "Standardized Options" Under Consideration are Ill-advised and Beyond the Commission's Authority

One of the strategies under consideration is the imposition of NRC-desired mechanisms, particularly the so-called holding period policy, that supposedly would foster a safety-conscious workplace. We strongly disagree with any proposal to standardize or specify which tools licensees should use to create a safety-conscious work environment. Standardized tools would not necessarily prove effective at all sites and might very well conflict with existing licensee

mechanisms. In short, fostering a safety-conscious work environment is not a "one size fits all" proposition.

While certainty in knowing what orders the Commission could legally take to address problems with resolution of employee concerns (if any such legal orders exist) would be helpful to licensees, we disagree with the set of "standard" options set forth in the proposed rule. First, the list of options is open-ended, for under Proposed Rule 50.x(d), the NRC "at its option" may impose any "requirement" on a licensee it desires if a safety-conscious workplace is deemed not to exist. Further, as noted above, as proposed, the safety-conscious workplace rule is likely to be enforced primarily through enforcement actions directed toward isolated workplace situations—an approach under which NRC action against licensee will not be "standardized" at all but will instead lead to inconsistent and unpredictable enforcement action.

Second, the specific options identified in Proposed Rule 50.x(d)(1)-(4) have not been established to be the most effective options available, or even to be effective at all. As noted above, the holding period policy is overly prescriptive and, to our knowledge, unprecedented. Moreover, with respect to a holding period policy, nothing in the *Federal Register* notice indicates under what authority the NRC could order a licensee to adopt such a novel employment policy. The NRC in the past has readily acknowledged that it has no authority to offer remedies to employees, yet the holding period policy is no more than a transparently unlawful attempt to supplement Section 211 by providing super-preliminary remedies to an employee who complains of (but has done nothing to prove) discrimination. We are not aware of any federal statute or regulation that forces an employer to continue to pay and provide benefits to a terminated employee simply because the employee alleges that his or her termination was discriminatory or otherwise illegal. Indeed, by mandating preliminary or "interim" remedies to an employee who prevails at an intermediate stage (the ALJ hearing) of a Section 211 case, Section 211 already is much more protective of employees than nearly all other federal labor and employment laws.

Likewise, site surveys (whether independent or licensee-conducted) should not be not ordered as a means to assess the "environment for raising safety and regulatory concerns" absent validation that such surveys are reliable indicators. In short, until the NRC and the industry have significantly more experience with the types of options the NRC is considering, such that the effectiveness of such options can be determined and validated, the NRC should not adopt any of the options as part of any "standardized" approach.

III. CONCLUSION

The NRC's proposed strategies for regulating licensee work environments are unnecessary, prescriptive, and ultimately—we believe—will prove to be an ineffective attempt to

regulate worker perceptions. The proposed regulatory regime could actually *decrease* plant safety margins. We urge NRC not to adopt the any of the strategies or concepts contained in the proposal.

As always, we appreciate the opportunity to provide input on a very important industry issue.

Sincerely,

David A. Repka

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Donn C. Meindertsma