

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER MERRIFIELD
SUBJECT: **SECY-99-223 - MILLSTONE INDEPENDENT REVIEW TEAM
MARCH 12, 1999, REPORT ON ALLEGATIONS OF
DISCRIMINATION IN NRC OFFICE OF INVESTIGATION
CASES NDA: 1-96-002, 1-96-007, AND 1-97-007, AND
ASSOCIATED LESSONS LEARNED- RECOMMENDATION
NO. 6**

Approved _____ Disapproved Abstain _____

Not Participating _____

COMMENTS:

See attached comments.

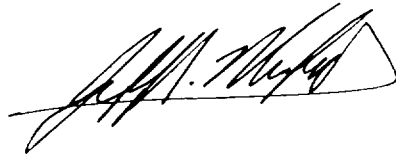

SIGNATURE

9/24/99
DATE

9910150196 991013
PDR COMMS NRCC
CORRESPONDENCE PDR

Entered on "AS" Yes _____ No _____

Commissioner Merrifield's Comments on SECY-99-223



9/24/99

For the reasons below, I would suggest the Commission approve a different approach than the four options proposed in the paper. Clearly, the need to have records of personnel actions that are necessary for the agency to sufficiently investigate allegations of discrimination is a serious issue. The MIRT team's report is useful in this context. However, it appears that the MIRT team found the evidence of record sufficient to determine whether discrimination occurred. The MIRT report questioned the available records in one case involving a large downsizing. However, the report concluded that the record compiled by the Office of Investigation in that case "negated any suggestion" that the lower ranking of those terminated had discriminatory underpinnings. Further, in making its recommendation, the MIRT report did not discuss our licensee's current record-keeping practices. For these reasons the Commission was not prepared to implement this recommendation, but directed the staff to further evaluate it.

The staff's current paper does not answer the questions left unanswered by the MIRT report. The paper does not explore the degree of record-keeping that already is being undertaken by licensees in response to large layoffs or reorganizations. Licensees have an incentive to maintain records in a manner sufficient to respond to Equal Employment Opportunity claims, Department of Labor discrimination claims, whistleblower protection claims, and other personnel matters. Although our focus is whistleblower protection, these other matters are significant. Given these unanswered questions, I cannot support either options 2 or 3, which would require licensees to retain certain records.

Based on the staff's current paper I also find it difficult to approve an information notice encouraging licensees to "document and retain all records relevant to any large scale reorganization or downsizing effort." We are not prepared to answer questions from either our licensees or the public regarding the specific records to be retained or the length of time we expect licensees to retain them because we have not focused on our licensees current record-keeping practices. If, at most we are intending to encourage licensees to retain records to demonstrate that their process was free of discrimination, I again have to question the usefulness of this reminder, since licensees already have a strong incentive to do this. The staff concluded that "although the cost of adding records requirements may not be substantial, the benefits could be very limited." I would suggest that simply encouraging licensees to retain records, rather than requiring records be kept, would yield an even smaller benefit.

Therefore, I believe the Commission should direct the Office of Investigations (OI) to consider this matter as it investigates future discrimination cases. If OI believes that licensees are destroying or failing to generate records that are necessary for the NRC to determine whether a licensee has disparately treated whistleblowers, OI should immediately inform the Commission of this matter. In that event, OI should work with the Office of the General Counsel to determine the legal and policy implications of requiring records to be "documented and retained."

Staff also says that options 2 and 3 would be a backfit pursuant to 10 C.F.R. 50.109. This conclusion is inconsistent with Commission policy and should not prevent the staff from pursuing the issue of records retention. As a policy matter, pure record-keeping and reporting requirements do not need to meet the requirements of the backfit rule to be justified. The backfit rule would require a showing of a "substantial increase in safety" as a result of the new requirement to be imposed. The test for record keeping is different. Specifically, such rules are subject to the balancing in 10 C.F.R. § 50.54(f), that "the burden to be imposed on respondents is justified in view of the potential safety significance of the issue to be addressed in the requested information." The Commission recently reiterated this policy in the Statement of Considerations on a final rule amending 10 C.F.R. Part 72. See 64 Fed Reg 33,178; 33,181 (1999).



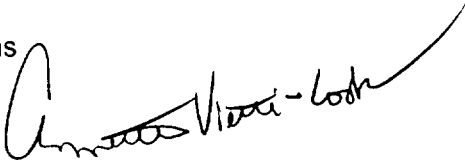
UNITED STATES
NUCLEAR REGULATORY COMMISSION

WASHINGTON, D.C. 20555-0001

October 13, 1999

SECRETARY

MEMORANDUM TO: William D. Travers
Executive Director for Operations

FROM: Annette Vietti-Cook, Secretary 

SUBJECT: STAFF REQUIREMENTS - SECY-99-223 -- MILLSTONE
INDEPENDENT REVIEW TEAM MARCH 12, 1999, REPORT ON
ALLEGATIONS OF DISCRIMINATION IN NRC OFFICE OF
INVESTIGATION CASES NDA: 1-96-002, 1-96-007, AND 1-97-
007, AND ASSOCIATED LESSONS LEARNED -
RECOMMENDATION NO. 6

The Commission has disapproved the staff's recommendation (Option 4) to encourage licensees to document and retain records relevant to any large scale reorganization or downsizing effort.

The Office of Investigations (OI) should consider this matter further as it investigates future discrimination cases. If OI believes that licensees are destroying or failing to generate records that are necessary for the NRC to determine whether a licensee has disparately treated whistleblowers, OI should immediately inform the Commission of this matter. In that event, OI should work with the Office of the General Counsel to determine the legal and policy implications of requiring records to be "documented and retained."

The staff noted that options 2 and 3 would be a backfit pursuant to 10 CFR 50.109. This conclusion is inconsistent with Commission policy and should not prevent the staff from pursuing the issue of records retention. As a policy matter, pure record-keeping and reporting requirements do not need to meet the requirements of the backfit rule to be justified. The backfit rule would require a showing of a "substantial increase in safety" as a result of the new requirement to be imposed. The test for record keeping is different. Specifically, such rules are subject to the balancing in 10 CFR § 50.54(f), that "the burden to be imposed on respondents is justified in view of the potential safety significance of the issue to be addressed in the requested information." The Commission recently reiterated this policy in the Statement of Considerations on a final rule amending 10 CFR Part 72 and in the statement of considerations for the proposed rules on reporting of reactor events. See 64 Fed Reg 33,178; 33,181 (1999) and 64 Fed Reg 36291, 36303 (July 6, 1999).

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cc: Chairman Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield
OGC
CIO
CFO
OCA
OIG
OPA
Office Directors, Regions, ACRS, ACNW, ASLBP (via E-Mail)
PDR
DCS