

October 13, 1999

COMMISSION VOTING RECORD

DECISION ITEM: SECY-99-223

TITLE: 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 (with Commissioners Diaz, McGaffigan, and Merrifield agreeing) disapproved the subject paper. Chairman Dicus approved Option 4 in the paper. The results are recorded in the Staff Requirements Memorandum (SRM) of October 13, 1999.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission, and the SRM of October 13, 1999.

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Annette Vietti-Cook  
Secretary of the Commission

Attachments: 1. Voting Summary  
2. Commissioner Vote Sheets  
3. Final SRM

cc: Chairman Dicus  
Commissioner Diaz  
Commissioner McGaffigan  
Commissioner Merrifield  
OGC  
EDO  
PDR  
DCS

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VOTING SUMMARY - SECY-99-223

RECORDED VOTES

	<b>APRVD</b>	<b>DISAPRVD</b>	<b>ABSTAIN</b>	<b>NOT PARTICIP</b>	<b>COMMENTS</b>	<b>DATE</b>
COMR. DICUS	X				X	9/15/99
COMR. DIAZ		X			X	9/23/99
COMR. McGAFFIGAN		X			X	9/28/99
COMR. MERRIFIELD		x			X	9/24/99

COMMENT RESOLUTION

In their vote sheets, Commissioners Diaz, McGaffigan, and Merrifield disapproved the staff's recommendation to encourage licensees to document and retain all records relevant to any large-scale reorganization or downsizing effort (Option 4), and provided some additional comments. Chairman Dicus approved Option 4. The Chairman also believed that OI should be directed to report back to the Commission rather than wait for OI to inform the Commission if there is a problem, thus indicating the Commission's interest in ensuring that allegations of discrimination are thoroughly and efficiently investigated. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on October 13, 1999.

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Chairman Dicus

I approve Option 4.

Commissioner Diaz

I do not find a sufficient basis in the staff's analysis that would warrant Commission action on the issue of licensees' recordkeeping regarding downsizing or reorganization. It appears that the staff has been able to conduct sound investigations under the present system. Although the issue is not deeply examined in the staff's presentation, it seems that licensees should already have substantial reason to generate and maintain records relating to a rational and proper basis for individual personnel decisions in the case of large layoffs or reorganizations. While the staff's recommendation (option 4) that the Commission simply encourage licensees to document and retain all records relevant to any large scale reorganization or downsizing effort has some appeal, the actual benefit or value of a generic encouragement, without much specificity or clarity, is not obvious.

I believe that the Commission remains strongly committed to deterring licensees and regulated parties from discrimination against individuals who raise safety concerns. It devotes substantial resources to assuring effective and efficient investigations of potential discrimination, and will assuredly continue to do so. The staff indicates that the Office of Investigations would consider the need to promptly issue a subpoena to capture the relevant records upon receipt of an allegation of discrimination, and the staff certainly should pursue all available tools for sanctioning any deliberate destruction of records as part of a scheme to discriminate.

Commissioner McGaffigan

I agree with Commissioner Merrifield that we need another approach, and I concur in the one he proposes. The recommendation that licensees retain all relevant documentary information regarding all employees affected in reorganization or downsizing has had an insufficient basis thus far, and this SECY paper does not make it sufficient. As Commissioner Merrifield points out, neither in 1-96-007-- the case that prompted the Millstone Independent Review Team (MIRT) to make its recommendation -- nor in any of the other cases the MIRT examined was it necessary to "analyze the circumstances based on disparate treatment". Thus the main strength of the MIRT's recommendation rests not on any case in which such information was in fact useful, but rather on hypothetical cases in which it *might* be useful. Perhaps such cases are possible, but neither the MIRT report nor this SECY paper says just how, and how often, such information might be useful. The paper does say that history suggests on average one larger layoff or reorganization a year that results in a complaint of discrimination, but that's not the same thing as saying that, in each of those cases, the records the MIRT wants retained would be either necessary or sufficient for finding whether there had been discrimination. If we're going to require licensees to retain possibly extensive records, we need to have a clearer idea of their usefulness.

There may be a good case to be made for retention, and Commissioner Merrifield's approach leaves the way clear for such a case to be made. In looking ahead, it is especially important, both for the issue raised by the MIRT recommendation, and for any issue of recordkeeping or reporting, that the staff and interested persons understand that backfit standards generally do not apply to recordkeeping or reporting requirements. Commissioner Merrifield points to Commission policy stated in the recent revision of Part 72. The same policy is reiterated even more recently in the statement of considerations for the proposed rules on reporting of reactor events. See 64 Fed. Reg **EXIT** . 36291, 36303 ( July 6, 1999).

Commissioner Merrifield

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).