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May 14, 1999

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Mr. Hubert J. Miller  
Regional Administrator, Region I  
U.S. Nuclear Regulatory Commission  
475 Allendale Road  
King of Prussia, PA 19406-1415

Subject: Letter of Reprimand  
(NRC Office of Investigations Case No. 1-97-007; IA99-015)

Dear Mr. Miller:

The attached materials respond to the Letter of Reprimand the Nuclear Regulatory Commission (NRC) issued to Raymond P. Necci on April 6, 1999. Mr. Necci specifically denies that his recommendation to dismiss the supervisor, Electrical Design Engineering (the Design Supervisor) was made, in whole or in part, because that supervisor engaged in protected activity.

Mr. Necci's statement in response to NRC's letter is set forth in Attachment.1. Although Mr. Necci has never been given the opportunity to face the evidence on which the NRC has erroneously concluded that he retaliated against the Design Supervisor, as more fully set forth in Mr. Necci's statement, the following facts are undisputed:

- Mr. Necci's only involvement in the protected activity of the Design Supervisor was his after-the-fact attempt to resolve the supervisor's concern over an alleged threat of termination. As far as Mr. Necci knew at the time, his efforts were successful and the misunderstanding that led to the supervisor's concern was resolved to the satisfaction of all.

Philadelphia   Washington   New York   Los Angeles   Miami   Harrisburg   Pittsburgh   Princeton  
London   Brussels   Frankfurt   Tokyo   Singapore   Jakarta

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- Approximately ten months after Mr. Necci resolved the Design Supervisor's concerns, he recommended the Supervisor be removed from supervisory duties for long-standing performance reasons.
- Mr. Necci only recommended the termination of the Design Supervisor because he was informed that senior Millstone management had instituted a new directive – independent from the Design Supervisor and in an effort to upgrade overall station performance – that eliminated the option of reassigning or demoting supervisors whose performance did not meet expectations. In short, Mr. Necci understood senior management to be indicating that the only way to remove supervisory duties from a supervisor who did not meet performance expectations was to terminate the employment of the supervisor.

The Supporting Legal Memorandum in Attachment 2 and Mr. Necci's Declaration in Attachment 1 demonstrate that at all times Mr. Necci acted in good faith and for valid reasons. There is simply no factual support for an NRC conclusion that ten months after Mr. Necci attempted to resolve the Design Supervisor's concern, and insofar as he was aware effectively resolved it, he nonetheless seized on the concern and illegally retaliated against the Design Supervisor by recommending he be removed from supervisory responsibility.

A number of considerations militate against NRC's conclusion. First, there is nothing in Mr. Necci's background that would suggest that he would retaliate against anyone. To the contrary, Mr. Necci has a 22-year unblemished record in the nuclear industry. Second, there is nothing about the Design Supervisor's concern that puts Mr. Necci in a bad light or provides a motive for him to retaliate. Third, the significant delay between the protected conduct in November 1994 and the adverse action in August 1995 suggests other issues caused Mr. Necci to recommend removal. Fourth, there is no probative evidence that creates a nexus between the Design Supervisor's protected conduct and Mr. Necci's removal recommendation. And, fifth, the proffered reasons for why Mr. Necci felt compelled to act are legitimate, clear, and are supported by overwhelming contemporaneous evidence.

Based upon Mr. Necci's sworn statement, information previously provided to the NRC during its initial investigation of this matter, and the Supporting Memorandum in Attachment 2, Mr. Necci requests that NRC withdraw the April 6, 1999 Letter of Reprimand; or in the alternative, requests that NRC hold a predecisional enforcement conference and provide Mr. Necci an opportunity to confront the specific information which causes NRC to conclude a violation occurred.

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This submittal discusses the work performance of certain individuals which is normally held in strict confidence by the Northeast Utilities System ("NU"), and to the best of my knowledge, this information has not been disclosed publicly and is not otherwise available in public sources. This information would also be contained in company personnel files and other similar confidential files. It is NU's belief that the public disclosure of this information would constitute a clearly unwarranted invasion of personal privacy and thus, is appropriate to be withheld under the provisions of 10 C.F.R. § 2.790(a)(6).

In addition to the protections from public disclosure for such information contained in the federal Freedom of Information Act and NRC regulations, Connecticut state law (Section 31-128f) prohibits the disclosure of information from an employee's personnel file without the employee's written authorization, unless the disclosure is made, among others "pursuant to a lawfully issued administrative summons or judicial order . . . , or in response to a government audit or investigation or defense of personnel-related complaints against the employer . . . ." Because these exceptions may not exist here, the public disclosure of this submittal could cause a violation of the Connecticut statute. Mr. Necci has requested that the Commission's Letter of April 6, 1999, be withdrawn and that it, and any references to it, not be placed in the Public Documents Room. If, for some reason, the Commission declines that request, Mr. Necci has enclosed Attachments 3 and 4, which redacts certain personnel-related information found in Attachments 1 and 2 for NRC review, and Attachments 5 and 6, which brackets the same personnel-related information.

Very truly yours,

  
\_\_\_\_\_  
Jay M. Gutierrez

Attachments

cc: Shirley Ann Jackson, Chairman  
Nils J. Diaz, Commissioner  
Greta Joy Dicus, Commissioner  
Edward McGaffigan Jr., Commission  
Jeffrey S. Merrifield, Commissioner  
J. Lieberman, Director, NRC Office of Enforcement

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ATTACHMENT 1

**DECLARATION OF MR. RAYMOND P. NECCI  
IN RESPONSE TO NRC'S LETTER OF REPRIMAND**

**DATED APRIL 6, 1999**

**(NRC/OI CASE NO. 1-97-007, 1A-99-015)**

**May 14, 1999**

**DECLARATION OF RAYMOND P. NECCI**

I, Raymond P. Necci, file this Declaration, under oath and penalty of perjury, in response to the Nuclear Regulatory Commission's ("NRC's") April 6, 1999 letter of reprimand.

**THE APRIL 6 LETTER**

The NRC has issued an April 6 letter of reprimand that accuses me of violating 10 C.F.R. § 50.7 when I recommended the dismissal of the Supervisor, Electrical Engineering (Design Supervisor) from Millstone Unit 2 in August, 1995.

I was surprised to receive this letter since the NRC had previously closed this matter out in August, 1998 without taking any action against me or Northeast Nuclear Energy Company at that time. Specifically, the NRC's letter from Wayne Lanning, NRC, to Martin L. Bowling, NNECO, dated August 26, 1998, stated:

OI Case No. 1-97-007 was initiated on March 6, 1997 to determine if a former Unit 2 electrical engineering supervisor was fired on August 2, 1995 for having raised concerns to the Nuclear Safety Concerns Program (NSCP). Based on a review of the matter, the NRC staff concluded there was not sufficient evidence to substantiate the allegation of discrimination.

In addition, I was upset to receive this letter because I was never even given the chance to look the decision-maker in the eye and respond to the allegations against me. Finally, I was shocked and angered by the letter because the accusations it makes against me are entirely false and an unfair slur on my reputation for integrity, honesty and safety consciousness – a reputation I have worked hard to build over a career of more than 22 years in the nuclear industry.

I file this declaration as part of my response to the April 6 letter. I request the NRC to reconsider the issuance of the letter, to withdraw the letter, and to not make the letter a public document. In the alternative, I request a face to face pre-decisional enforcement conference

with the NRC and for the NRC to reconsider its letter of reprimand before it determines to make the April 6 letter public.

## THE FACTS

### I. Summary of the Facts

1. In August 1995 I recommended that the Design Supervisor be removed as one of my supervisors because he had significant performance problems as a supervisor during the previous 18 months. When I advised my boss, the Vice President of Engineering Services, that I wanted to remove the Design Supervisor as one of my supervisors, he informed me that senior management, in an attempt to improve the performance of Millstone's management, including first line supervisors, had directed that supervisors with performance problems would no longer be demoted or transferred; rather, any supervisor with performance problems would be dismissed. Thus, I was informed that if I wanted to remove the Design Supervisor as one of my supervisors, the effect would be that he would be dismissed. Because it was clear to me that the Design Supervisor could not perform at the level I expected from my supervisors, in accordance with the new Millstone directive that I was instructed to follow, I recommended the Design Supervisor's dismissal from Millstone. In no way did I seek to remove the Design Supervisor from his supervisory duties because he had engaged in some protected activities at Millstone.

2. The Design Supervisor filed a grievance challenging his dismissal. I understand that the grievance was upheld and his dismissal was reversed because the Design Supervisor's termination did not follow the Company's internal process of providing the Design Supervisor with adequate communication regarding his performance deficiencies and an opportunity to improve his performance. I also understand that the grievance committee recognized the Design Supervisor's performance problems as a supervisor and did not make any findings that his removal as a supervisor was in retaliation for the Design Supervisor having engaged in protected activities. Finally, I understand that the Design Supervisor

## **II. My Decision to Recommend Removal of the Design Supervisor**

### **A. The Design Supervisor's November 1994 Complaint**

3. The NRC has accused me of recommending the Design Supervisor's dismissal in August 1995 because he participated in protected activity approximately ten months earlier, in November 1994. This is untrue. The fact is, I was not the subject of the Design Supervisor's November 1994 concern, and my only involvement in that matter was after-the-fact, when I assisted in resolving the misunderstanding that led to that concern.

4. In late 1994, I was the Director, Nuclear Engineering, for Millstone Unit 2. Both the Manager of Millstone 2 Design (Design Manager) and the Design Supervisor worked for me. The Design Manager was the Design Supervisor's boss. In November 1994, Millstone Unit 2 was several weeks into what became an extended outage. One of the problems that had to be cleared up during the outage involved the Engineered Safeguards Actuation System (ESAS), a significantly troubled project that was the responsibility of the Design Supervisor and his Electrical Design Engineering Group. Sometime in November 1994, during a meeting between the Design Supervisor and the Design Manager, the Design Manager made a comment that the Design Supervisor apparently understood to mean that the Design Supervisor would be fired if the ESAS project extended the outage. As a result of the comment, the Design Supervisor complained to the Director of Millstone's Employee Concerns Program (ECP). I first learned that the Design Supervisor had brought a concern to the Director of Millstone's ECP when the Vice President Engineering Services spoke to me and the Design Manager regarding the Design Supervisor's concern. The Vice President Engineering Services was my boss at that time.

5. I spoke to the Design Manager to obtain his account of the conversation with the Design Supervisor. The Design Manager described the conversation as an attempt by him to re-emphasize what he had communicated previously to the Design Supervisor; namely, that the ESAS project was not going well. It had not been planned or prepared adequately prior to the outage; it was stalled with no clear direction from the Design Supervisor; the Design Engineering Group's failure to handle the ESAS project was having an impact on the Unit; and this failure was under scrutiny by top management.

6. In an effort to put an exclamation point on the communication, the Design Manager apparently stated words to the effect that they were all going to get fired if they didn't get the project moving in the direction toward a solution. At the time, I credited the Design Manager's account of his conversation, because it was entirely consistent with my own view

of the performance of the Design Supervisor and his group. At the same time, however, I felt that the Design Manager could have expressed his concern over the Design Supervisor's performance and the status of the project more directly and with less emotion.

7. In a meeting between myself, the Design Manager and the Vice President Engineering Services, the Vice President counseled the Design Manager for communicating in such a manner. I agreed that the Design Manager could have better communicated his otherwise legitimate concern about the Design Supervisor's performance.

8. Shortly thereafter, consistent with the direction of the Vice President Engineering Services, the Design Manager and I met with the Design Supervisor to explain to him that the intent of the Design Manager's earlier communication was not to threaten the Design Supervisor with termination, but was merely an effort to emphasize the deficient performance on the ESAS project and the need for Design Engineering to get the project on track and to consider itself accountable for achieving results. From what I was told in the course of my own investigatory interview, the Design Supervisor's own notes of his meeting with the Design Manager indicate that the thrust of the discussion was that the Design Supervisor would be removed from the project if performance on the project did not improve.

9. As far as I was aware at the time (and as far as I am aware now), that was the end of this issue. The Design Supervisor and the Design Manager appeared to resolve the Design Supervisor's initial misconception and appeared to be interacting in a professional manner.

10. In short, my only involvement with the Design Supervisor's November 1994 concern was that I took the lead in correcting any misimpression that might have been created from the Design Manager's poorly chosen words, and I attempted to resolve an issue that I played no role in creating.

B. The Design Supervisor's Performance Issues and My Decision To Remove The Design Supervisor's Supervisory Duties in July 1995

11. My decision to remove the Design Supervisor's supervisory duties in the July-August, 1995 time frame, had absolutely nothing to do with the Design Supervisor's November 1994 complaint. Rather, that decision was based upon the Design Supervisor performance over an 18 month period of time when he was within my chain of command.

The Design Supervisor's performance issues.

12. The Design Supervisor began working as one of my supervisors in January, 1994. Throughout 1994 and 1995, I was increasingly dissatisfied with the performance of the Design Supervisor's Electrical Design Engineering Group. I felt that the ESAS project had been poorly planned, had been untimely, was inadequately presented to the Plant Operations Review Committee (PORC), and that there had been implementation problems that should not have occurred or should have been anticipated. I thought at the time that most of these performance issues were attributable to poor planning and poor implementation by the Design Supervisor.

13. In February 1995, the Design Manager completed a comprehensive performance evaluation of the Design Supervisor's [redacted] The evaluation highlighted the Design Supervisor's supervisory performance deficiencies and included not only specific project related criticisms, but also criticisms of his supervision of subordinates and his lack of assertive direction and control over the work in his group. This evaluation was provided to NRC during its initial review into this matter.

14. The performance evaluation did not have the desired effect of improving the Design Supervisor's performance. Other events occurred within the Electrical Design Engineering Group between the evaluation and the Design Supervisor's termination that further eroded my confidence in the Design Supervisor's ability to supervise and manage the engineers and the projects in his group. The failure of the Fast Transfer Project and an incident involving the ATWS system during early July 1995 were illustrative examples further reflecting the fact that there were problems with performance, decision-making and project implementation within his Group.

15. In short, the Design Supervisor's Electrical Design Engineering Group experienced a series of inexcusable failures resulting from poor engineering performance and poor supervision during an important time for Unit 2. Thus, by August 1995, both the Design Manager and I concluded that we needed stronger supervision in the Group and that the Design Supervisor could not continue in this position. Again, to summarize some of the Design Supervisor's supervisory shortcomings:

- He did not consistently demonstrate an ability to develop solutions to problems relating to projects for which he was responsible.

- He did not manage resources effectively and rejected the need for help when asked.
- He did not consistently demonstrate an aggressive pursuit of problems and solutions or the timely and successful completion of projects.
- It became necessary to bring in extensive engineering support from outside the unit to lead the completion of the ESAS project. This included a former employee, consultants, and employees from other NU facilities.
- The Design Supervisor did not exhibit leadership attributes within the Group, which had a negative effect on the morale of employees in the Group.

#### The Decision To Remove The Design Supervisor From His Supervisory Position

16. These performance problems made it clear to me that the Design Supervisor could no longer continue as one of my supervisors. The straw that broke the camel's back for me was the ATWS system failure in early July. Even though the Design Supervisor was on vacation at the time of that failure, the underlying reasons for the failure were the same lack of high standards that concerned me about the Design Supervisor's supervisory performance over the past 18 months. As a result of the ATWS event, I concluded that the Design Supervisor would have to be removed as a supervisor in my unit. The Design Manager was in full agreement with this decision.

17. [redacted] after the Design Manager and I reached this decision. [redacted] I learned that the Design Manager had been advised that under an enhanced accountability directive the Design Supervisor should be terminated. Since this was not what I had been considering for the Design Supervisor [redacted] I asked the Design Manager to hold up on any action concerning the Design Supervisor until [redacted]

#### C. I Recommend the Termination of the Design Supervisor.

18. When I returned from [redacted] I discussed my decision to remove the Design Supervisor from supervisory duties with my boss, the Vice President Engineering Services. He informed me that top management had instituted a new directive in order to

instill a heightened level of supervisory accountability for performance and results. No longer would lateral transfers and demotions be an option for dealing with supervisors and managers whose performance failed to meet expectations. Rather, these supervisors and managers would be terminated. In short, under this directive the only way I could remove the Design Supervisor's supervisory duties was to recommend his dismissal from the Company. And that is what I did.

### III. The Design Supervisor Successfully Grieves His Termination

19. As a result of the decision to terminate his employment, the Design Supervisor filed a grievance with the Company. The Grievance Panel, consisting of three senior executives of the Company, reversed the termination for reasons relating to the Company's internal policies and procedures. They concluded that the Supervisor did not demonstrate the supervisory skills necessary for his position as a Supervisor. However, they also concluded that the Design Supervisor had not been given adequate notice that his performance problems might lead to his termination. I agreed with the Grievance Board's conclusion that mistakes were made in not following our personnel procedures.

20. The Design Supervisor was [REDACTED]

[REDACTED] The Design Supervisor has [REDACTED]

**IV. Conclusion**

21. It is easy to level unfair and inaccurate charges of retaliation and improper conduct. As the April 6 letter makes clear, such unfair and inaccurate charges can be made succinctly and without any supporting evidence. On the other hand, to respond to those charges takes time, and requires a detailed presentation of all the facts. Thus, although I have tried to be as brief as possible, this Declaration has, of necessity, been far longer than the NRC's April 6 letter. But the bottom line can be put succinctly and directly. The April 6 letter was not fairly issued and reaches a flatly incorrect conclusion. It was issued without giving me any opportunity to respond to the evidence and allegations against me. It reached an inaccurate conclusion that tarnishes my otherwise unblemished career. In the name of simple fairness, I urge the NRC to withdraw the April 6 letter.

I declare under penalty of perjury that the foregoing is true and correct.

May 13, 1999

  
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RAYMOND P. NECCI

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**ATTACHMENT 2**

**LEGAL MEMORANDUM IN SUPPORT OF  
NRC WITHDRAWAL OF ITS LETTER OF  
REPRIMAND TO RAYMOND P. NECCI  
DATED APRIL 6, 1999**

**May 14, 1999**

**LEGAL MEMORANDUM IN SUPPORT OF  
NRC WITHDRAWAL OF ITS LETTER OF  
REPRIMAND TO RAYMOND P. NECCI  
DATED APRIL 6, 1999**

**Introduction**

On April 6, 1999, NRC issued NNECO three violations based upon 10 C.F.R. § 50.7. Violation C to that letter is relevant to Mr. Necci. It states in relevant part:

. . .the Licensee discriminated against a Supervisor in the Engineering Services Department at the Millstone Station due to his involvement in protected activities. Specifically, in August 1995, the Licensee's Director of Nuclear Engineering and the Manager of Nuclear Design Engineering recommended and obtained the dismissal of the Supervisor in the Engineering Services Department, at least in part, because the Supervisor had reported to higher management and the Millstone Safety Concerns Program threats and concerns about the timing of completion of modifications to the Engineered Safeguards Actuation System. (03012)

This is a Severity Level II violation (Supplement VII).

Also on April 6, 1999, the NRC issued Mr. Necci a letter of reprimand.

The letter to Mr. Necci states:

The Investigation and subsequent independent review support a finding that your action in August 1995 in recommending the dismissal of this supervisor was taken, at least in part, because the supervisor engaged in protected activities at Millstone. This constitutes discrimination which is prohibited by 10 CFR 50.7

The letter to NNECO on this same matter states:

The Supervisor, Electrical Engineering, in the Engineering Services Department engaged in protected activities when he reported to higher-level management and the Millstone Nuclear Safety Concerns Program that his immediate superior – the Manager of Nuclear Design Engineering – had threatened him and another employee with dismissal if work on an Engineered Safeguards Actuation System modification to which his electrical engineering group had been assigned was not completed before the scheduled conclusion of a Millstone Unit 2 refueling outage.

Letter from Hubert J. Miller to Bruce Kenyon, dated April 6, 1999 at p. 2.

The assessment from the Millstone Independent Review Team (MIRT) in its Report of Review into the Allegations of Discrimination in NRC Office of Investigation's Case Nos. 1-96-002, 1-96-007, 1-97-007, and Associated Lessons Learned, is brief, but provides some insight into the rationale which supports NRC's findings. It states:

E. Case No. 1-97-007

OI Case No. 1-97-007 involved an electrical engineering supervisor whose employment was terminated in August 1995. The assigned justification for that action was that his performance in that role was unsatisfactory and, under a newly-formed accountability philosophy, in such circumstances dismissal rather than demotion was required. The employee insisted, however, that his dismissal was in retaliation for his having immediately reported to higher-level management a threat he had allegedly received from his immediate supervisor approximately nine months earlier. As he had interpreted the threat, he was being told that, if modifications on a Millstone Unit 2 safety-related system extended a refueling outage then in effect, he and a subordinate engineer assigned to the project would be fired. Thus, he was being at least implicitly directed to cut corners if necessary to ensure that the project did not hold up resumption of Unit 2 operation.

Our analysis of the record persuaded us that the reason assigned for the employee's termination was pretextual and that, in actuality, he was a victim of discriminatory action based upon his protected activity in reporting the threat. Two considerations principally undergird this conclusion.

First, the management officials responsible for the termination decision maintained that, in the 1994-95 time period, his supervisory performance was so poor that resort [sic] to a performance improvement plan would have served no good purpose. (Subsequently, a grievance committee [redacted] that Company and departmental policy had required that he be given an opportunity to improve his performance.) Yet, the employee had become a supervisor in the [redacted] and the OI investigation revealed that, up to 1994, his performance appraisals were unblemished.

Second, the primary assigned example of assertedly poor supervisory performance involved an untoward incident that occurred when the employee was on vacation. The explanation given by management for nonetheless holding him accountable for the incident was specious. Moreover, the individual found principally responsible for the incident was later given supervisory responsibilities.

Consequently, we have concluded with respect to this case that, based on all the available evidence, there is information sufficient to provide a reasonable expectation that a violation of section 50.7 can be shown by a preponderance of the evidence.

## II. Elements of Violation and Standard of Review

The MIRT appropriately identified the four elements for a review in a discrimination case:

1. Did the employee engage in protected conduct?
2. Was the decision maker aware of the protected conduct?
3. Was an adverse action taken against the employee?
4. Was the adverse action taken because of the earlier protected activity?

The MIRT also correctly points out that in virtually all cases, the factual disputes surround the fourth question, and at times the facts must be analyzed under the so-called

"dual motive" analysis. Although we have a question as to MIRT's view of the necessary analysis to be followed in a dual motive case, the determinative point on which there can be no question is that protected conduct did not play a role in Mr. Necci's recommendation. In short, even under the MIRT's more lenient standard, NRC has not set forth sufficient evidence that Mr. Necci contributed to a violation under 10 C.F.R. § 50.7. As the MIRT says in its Report:

"Contribute" is defined as "to play a significant part in bringing about an end or result." Webster's Dictionary at 247. And, in turn, "significant" is defined as "having or likely to have influence or effect." *Id.* At 1079. These definitions, in concert, arguably strike the proper balance. And consistent with their terms, knowledge that an employee has engaged in protected activity by the Company official taking the adverse action, standing alone, would not be enough to establish that the protected activity was a "contributing factor." Instead, there would need to be an adequate evidentiary basis, i.e., a preponderance of the evidence, for a reasonable inference that the Company official had some motivation or impetus relating to the protected activity that, in some meaningful way, was an ingredient in the decision to take the adverse action. (Emphasis added)

As more fully set forth in Section III, there is not a sufficient evidentiary basis for a reasonable inference to be drawn that Mr. Necci retaliated against the Design Supervisor. To the contrary, there is overwhelming evidence that Mr. Necci acted for legitimate business reasons.

### III. Analysis of Facts Under Governing Law

Three of the four questions under a 50.7 analysis can be easily answered in this case. The Supervisor engaged in protected conduct. In November 1994, he went to the Director of the Millstone Employee Concerns Program and ~~\_\_\_\_\_~~ involving the Engineered Safeguard Activation System (ESAS). Shortly thereafter, Mr. Necci became aware of that protected conduct. The Director of the Employee Concerns Program brought the Design Supervisor's concern to the attention of the Vice President of Engineering and Mr. Necci. He brought it to their attention so that they, as senior management, could directly address the Design Supervisor's concern. Mr. Necci

also recommended the removal of the Design Supervisor in August 1995. He did so only after the Design Manager counseled the Design Supervisor, documented the deficient performance in an evaluation, and the Design Supervisor failed to improve his performance.

The only issue is whether Mr. Necci's motive in later recommending the Design Supervisor's removal in August 1995 was the November 1994 concern to ECP, or rather legitimate business reasons. To find against Mr. Necci, NRC would have to conclude that ten months after he learned of the Design Supervisor's concern – and after he effectively addressed and resolved it – he nonetheless seized on that concern and illegally retaliated against the Design Supervisor by recommending his termination. Such a finding and conclusion would be without a factual basis. What the overwhelming evidence shows is that Mr. Necci was not seeking to retaliate; but rather, took action against an otherwise good engineer, and long time employee, who was simply neither succeeding as a supervisor nor elevating his performance to newly-enforced standards of accountability.

A number of factors should cause any reasonable person to conclude that Mr. Necci acted for legitimate reasons. First, there is nothing in Mr. Necci's background that would suggest a propensity to retaliate against an individual for raising a concern. In 1994, Mr. Necci was not new to nuclear power. He was keenly aware of the right of employees to raise concerns, without fear of retaliation, and the obligation of management to appropriately respond to employee concerns. Mr. Necci has been promoted to positions of increasing responsibility, in part, because he is particularly good at listening to employees and appropriately responding to their issues. Indeed, in his current position of Vice President, Nuclear Oversight and Regulatory Affairs, his principal responsibility is to assure issues are identified, documented, and appropriately dispositioned. In short, there is nothing in Mr. Necci's background that would suggest a propensity to retaliate. As MIRT claims about the employment record of the Design Supervisor, so too Mr. Necci has an unblemished record.

Second, there is nothing about the concern itself that puts Mr. Necci in a bad light or would provide a motive for him to seek revenge against the Supervisor in this particular case. He was not the object of the concern. In fact, ECP involved Mr. Necci to help resolve the issue. From Mr. Necci's perspective, the issue appeared to be resolved in a manner to satisfy the Supervisor. Having been put on notice in November 1994 that the Supervisor would be willing to "take on" line-management when he felt he was not being treated appropriately in the workplace, it would be nothing short of self-destructive for Mr. Necci to seek the Supervisor's removal in August 1995 if he did not feel there existed legitimate business reasons that compelled him to act.

Third, the significant delay between the protected conduct in November 1994 and the adverse action in August 1995 suggests other issues were the cause of Mr. Necci recommending that the Supervisor be terminated. This is not a case of "temporal proximity," where an employee suffers adverse action on the heels of raising a concern. Rather, this is a case where much time had passed, and many events have occurred, from the time the Supervisor went to ECP to the time of his termination. As documented in the [REDACTED] Performance Evaluation, and further illustrated by the cited examples from the summer of 1995, the Design Supervisor had performance deficiencies that could not go uncorrected.

Fourth, there is no probative evidence that creates a nexus between the Supervisor's protected activity and Mr. Necci's removal recommendation. NRC has not, as it should have, and in the words of MIRT, set forth an "adequate evidentiary basis, i.e., a preponderance of the evidence, for a reasonable inference that the Company official had some motivation or impetus relating to the protected activity that, in some meaningful way, was an ingredient in the decision to take adverse action."

On the contrary, the MIRT, in the absence of any probative evidence, relied on speculation to make its findings. It misconstrued the Design Manager's unartful direction to the Supervisor to take accountability and appropriately and efficiently to address the ESAS project, to "he was being at least implicitly directed to cut corners if necessary to ensure that the project did not hold up resumption of Unit 2 operation." No credible evidence has been identified for a fact finder to draw that inference.

Fifth, and in contrast to MIRT's "two considerations", the proffered reasons for why Mr. Necci felt compelled to act are legitimate, clear, and have been corroborated by overwhelming contemporaneous evidence. A review of this evidence provides the key to understanding what motivated Mr. Necci to make his recommendation. The nature of the Supervisor's performance deficiencies are well documented and have been provided to the NRC as part of its initial investigation. Those deficiencies existed and were documented in a [REDACTED] performance evaluation for a period that spanned both before and after the Supervisor's concern over his Manager's alleged threat. Neither the Manager nor Mr. Necci used the performance evaluation as an opportunity to take adverse action against the Supervisor - as they could if, as alleged, they had discriminating intent as a result of the Supervisor's November 1994 concern. Instead, Mr. Necci and the Manager used the evaluation as an opportunity to once again point out performance problems and to provide the Supervisor with an opportunity to improve. In addition, Millstone management provided extraordinary assistance comprised of consultants and other Company resources in order to

help the supervisor be successful. The well documented fact is that, despite this opportunity, the Supervisor's performance did not improve.

The assessment of the Supervisor's performance that contributed to the decision to remove him as a supervisor was fair, reasonable and accurate. The objective measures of his supervisory performance demonstrate that in 1994 and 1995 the Design Supervisor was not being effective as a supervisor. The facts simply do not support any conclusion that the negative assessment of his supervisory performance was because he had gone to the ECP. Similarly, the facts do not support the conclusion that the decision to terminate was because he went to the ECP.

Without any analysis of the Design Supervisor's performance deficiencies, or of the unblemished record of those managers who they found against, the MIRT finds the reasons given for the Supervisor's termination to be pretextual. The MIRT cites two considerations for this conclusion. It is hard to understand why the MIRT focused on these considerations. The MIRT dismissed the proffered reasons in a conclusory sentence, finding them pretextual and then discusses its two considerations. The MIRT finds first, "... the employee had become a supervisor in the [redacted] and the OI investigation revealed that, up to 1994, his performance appraisals were unblemished." The fact that the employee had been a [redacted] is at best a neutral fact concerning his performance. Nor is it unreasonable to suggest that someone with an "unblemished record" over [redacted] would have progressed within a large organization rather than remain [redacted]. In any event, the Supervisor's earlier appraisals were far from "unblemished." In fact, the Design Supervisor had been counseled by the Design Manager relative to poor performance on the ESAS project before the misunderstanding in November 1994 that gave rise to the Design Supervisor going to the ECP. Mr. Necci knew of this earlier counseling.

The MIRT also does not in any manner deal with Mr. Necci's explanation of heightened accountability to explain the perceived discontinuity with prior treatment of the Supervisor. There is nothing pretextual or discriminatory about management in a nuclear power plant demanding heightened accountability. No one has suggested the introduction or implementation of this directive was linked to the Design Supervisor's earlier protected conduct. For his part, Mr. Necci applied the directive to the Supervisor consistently, with no intent to retaliate, and as directed by his boss. NNECO imposed this new accountability independent of the Design Supervisor and elsewhere in the organization in an effort to improve.

The MIRT adds a second consideration that caused it to conclude the proffered reasons for removal of the Design Supervisor were pretextual. The MIRT states the primary assigned example of assertedly poor supervisory performance involved an "untoward incident" that occurred when the Supervisor [redacted]. This is simply wrong. As Mr. Necci has explained, this example was the straw that broke the camel's back, and caused Mr. Necci to conclude that despite earlier counseling and an adverse performance evaluation, the Design Supervisor simply had not corrected previously identified performance deficiencies.

#### **IV. Other Relevant Considerations**

Even if NRC believes Mr. Necci improperly recommended removal in an effort to retaliate, then under NRC's own guidance, it should not have issued a sanction in this case. Under its Enforcement Policy, the NRC may refrain from taking enforcement action for cases involving discrimination when a licensee who, without need for government intervention, identifies an issue of discrimination and takes prompt, comprehensive, and effective corrective action. Here, NNECO's internal appeals process upheld the Design Supervisor's grievance, and reversed his termination. The Design Supervisor [redacted]

Moreover, NNECO has taken extensive corrective actions to restore and maintain a safety conscious work environment at Millstone, and NRC's inspections and reviews have concurred.

Finally, the Commission's failure to provide Mr. Necci with any opportunity to present information relevant to the Commission's "findings" contrasts sharply with the due process protections afforded individuals in the NRC's Enforcement Policy. The NRC's Enforcement Policy makes clear that enforcement against individuals will not normally be taken unless and until the individual has had the opportunity to provide the Commission with "information that will assist the NRC in determining the appropriate enforcement action, such as a common understanding of facts, root causes and missed opportunities associated with the apparent violations." General Statement of Policy and Procedure for NRC Enforcement Actions. In this regard, the Policy notes that where enforcement involves possible deliberate misconduct or an unlicensed individual, such an opportunity will "normally be provided." *Id.*

The MIRT praised the existence of the due process protections provided in the Enforcement Policy. In particular, the Team emphasized the importance of giving individuals accused of deliberate misconduct the opportunity to address the matters which form the basis for the actions. U.S. Nuclear Regulatory Commission Millstone Independent

Review Team Report of Review, dated March 12, 1999, at 20. Considering that the events which form the basis for Mr. Necci's letter took place four years ago, and considering that Mr. Necci's intent lies at the heart of the matter, his input is essential to the compilation of a complete record.

Inexplicably, the Commission has ignored its Enforcement Policy and ignored the pointed observations of the Independent Review Team. Instead, the Commission has prejudged Mr. Necci's motives, decided upon his culpability, and administered punishment without advising him of the charges, without informing him of the evidence, and without affording him an opportunity to address the issues. It is no solace to Mr. Necci -- and no substitute for due process -- that the Commission has allowed him to submit a response to vague allegations at this late date. The essence of due process is to be advised of the charges in a meaningful way and to have the opportunity to address these matters before the decision maker considers the evidence. As the MIRT noted, it is only with such information that the Commission can make a "fully informed enforcement decision." *Id.* The Commission's unwarranted and unfair rush to judgment in this case has deprived Mr. Necci of his right to due process and placed the Commission in the untenable position of deciding an important matter on the basis of an incomplete record.

In light of the above, we respectfully request that the Commission withdraw the Letter of Reprimand issued to Mr. Necci by letter dated April 6, 1999. If the information provided to date does not cause the Commission to withdraw its letter, we respectfully request that Mr. Necci be given an opportunity to meet with the NRC, and to confront specific information that causes NRC to conclude a violation occurred.