ENCLOSURE 4

United States
Nuclear Regulatory Commission

Report of Review

MILLSTONE UNITS 1, 2, AND 3:

Allegations of Discrimination in NRC Office of Investigations Case Nos. 1-96-002, 1-96-007, 1-97-007, and Associated Lessons Learned

Millstone Independent Review Team

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TABLE OF CONTENTS

I. Evidentiary Standard of Review 3

II. Analysis of Cases 9

III. Enforcement Recommendation 15

IV. Lessons Learned 21

V. Conclusion 28

Attachments:

1. OGC Guidance for Determining Whether Discrimination Occurred

2. Case Study -- OI Case No. 1-96-002

3. Case Study -- OI Case No. 1-96-007

4. Case Study -- OI Case No. 1-97-007

5. Separate Statement of Alan S. Rosenthal

REPORT OF REVIEW OF ALLEGATIONS IN NRC OFFICE OF INVESTIGATIONS CASE NOS. 1-96-002, 1-96-007, 1-97-007, AND ASSOCIATED LESSONS LEARNED

In accordance with Chairman Jackson's January 28, 1999 tasking memorandum and the Chairman's February 9, 1999 memorandum establishing a charter for the Millstone Independent Review Team (MIRT), we have conducted a review of Office of Investigations (OI) Case Nos. 1-96-002, 1-96-007, and 1-97-007, all of which were described or referenced in the Office of the Inspector General (OIG) Event Inquiry, Case No. 99-01S (Dec. 31, 1998) [hereinafter OIG Report]. Based on that review, we have concluded the following:

1. With respect to Case No. 1-96-002, as described in Attachment 2, the available evidence is sufficient to support the conclusion that the two allegers were the subjects of discrimination in violation of 10 C.F.R. § 50.7.

2. With respect to Case No. 1-96-007, as described in Attachment 3, the available evidence is insufficient to support the conclusion that the three allegers were the subjects of discrimination in violation of section 50.7.

3. With respect to Case No. 1-97-007, as is described in Attachment 4, the available evidence is sufficient to support the conclusion that the alleger was the subject of discrimination in violation of section 50.7.

Further, although we find there is an adequate basis for a finding of discrimination in two of these three cases, we recommend that no enforcement action be taken. Our conclusion in this regard is based on the utility's apparently successful response to the remedial requirements already imposed by the agency to correct discrimination at the Northeast Utilities System (NU) Millstone facility.

In section II of this report, we summarize the results of our review of each of the three cases and, having concluded there is a sufficient evidentiary basis for proceeding in two of these cases, in section III explain our recommendation regarding appropriate enforcement action.

In addition, based on our review of the OI investigative materials for these cases and the information provided in connection with background interviews conducted by the MIRT with individuals from the Office of the General Counsel (OGC), the Office of Enforcement (OE), OI, and OIG, we have concluded there are certain "lessons learned" that can be drawn relative to the investigative and enforcement processes that were utilized in these cases. These are set forth in section IV of this report. Moreover, as requested in the Chairman's January 28, 1999 memorandum, and as an introduction to our discussion regarding the merits of the individual OI cases, in section I of this report we provide a

discussion of the "standard of review" for initiating enforcement cases concerning violations of the provisions of 10 C.F.R. § 50.7 that afford individuals protection from discrimination based on their involvement in "protected activities."

Gary K. Hamer, Supervisory Investigator with the United States Office of Special Counsel (OSC), acting as an expert advisor to the MIRT, participated in our background interviews and discussions regarding the attached case studies, and reviewed the final case studies and this report. He agrees with the conclusions and recommendations made in this memorandum and the accompanying case studies.

Also acting as an expert advisor to the MIRT was Alan S. Rosenthal, former Chairman of the NRC Atomic Safety and Licensing Appeal Panel and the General Accounting Office Personnel Appeals Board. He likewise participated in our background interviews and discussions regarding the attached case studies, and reviewed the final case studies and this report. His views concurring in the contents of this report and the attached case studies are included as Attachment 5.[1]

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[1] The Review Team would like to express its appreciation to the administrative staff of the Atomic Safety and Licensing Board Panel, in particular Jack Whetstine, Sharon Perini, Allene Comiez, and James M. Cutchin, V, for their invaluable assistance in the preparation of this report.

I. EVIDENTIARY STANDARD OF REVIEW

Before providing our analysis of the particular OI cases, we outline the general standard of review we consider appropriate for reaching a decision about whether there is an adequate evidentiary basis to proceed in connection with each of these cases. It should be noted, however, that this is not the equivalent of a determination about whether to actually proceed with an enforcement action. Although a determination about whether there is an adequate evidentiary basis to sustain a discrimination allegation may be a substantial factor in making a decision to proceed with an enforcement action, that enforcement decision also involves consideration of the exercise of enforcement discretion, with all of its policy and resource implications.

A. Four Elements for Review in Discrimination Cases

We discussed with both OE and OGC the standard they currently use to determine when an enforcement case should be instituted relative to claimed violations of section 50.7. We were provided with a copy of guidance recently prepared by OGC for use by the staff in determining whether discrimination occurred in violation of section 50.7. In that memorandum, a copy of which is included as Attachment 1, OGC describes an analytical framework for determining whether discrimination occurred, pertinent parts of which we summarize below.

As this guidance is relevant to the three cases we were asked to review,[2] four elements are of critical importance:

1. Did the employee engage in protected activity?

To answer this question requires a determination about whether the employee took some action to raise or advance a nuclear safety concern. As the OGC memo notes, activities might include instituting an NRC or Department of Labor (DOL) proceeding, documenting safety concerns, or an internal or external expression of safety concerns.

2. Was the employer aware of the protected activity?

This element necessitates a finding that the employer knew about the employee's nuclear safety concern or activities to advance the concern. An employer would not be liable for violating section 50.7 if an employee failed to articulate a safety concern in a way that brought it to the employer's attention.

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[2] As the OGC memo notes, other elements, such as whether the individual who is the subject of the claimed discrimination is an "employee," may be involved; however, they are not at issue in the OI cases we reviewed.

3. Was an adverse action taken against the employee?

To satisfy this component, it is necessary to conclude that the employer visited some detrimental effect on the employee's terms, conditions, or privileges of employment. As OGC points out, this could include a variety of actions ranging from actual termination to the threat to take some detrimental action.

4. Was the adverse action taken because of the protected activity?

This requires a finding that there is a causal link between the adverse action and the protected activity. Thus, in considering an employer-articulated reason for taking an adverse action that invariably is interposed to demonstrate the action was not taken because of an employee's protected activity, it is necessary to determine whether (1) the articulated reason is a pretext intended to conceal an action taken solely because of protected activity; or (2) the articulated reason is part of a dual motive for the action in that there was both a legitimate and an improper, discrimination-based reason for the action, with the latter being a "contributing factor" to the action.[3]

B. Standard for Determining Whether There Is A Sufficient Evidentiary Basis to Institute an Enforcement Action

1. Nature of the Evidence in Discrimination Cases

Although all four of the items described above are necessary to make out a case of discrimination under section 50.7, the fourth item is the most problematic, both generally and in the cases we were asked to review. This is because it is rare that this crucial element can be established by so-called "smoking gun" evidence, i.e., evidence that irrefutably shows the adverse action was pretextual. (The clearest example of such evidence would be an admission by the official of the employer who was directly responsible for the adverse action that he or she took that action against the employee because the employee engaged in protected activity.)

Instead, what usually is available from an investigation into a section 50.7 discrimination allegation is testimony and documentary information, often conflicting, that provides circumstantial evidence of whether an adverse action was taken because an employee engaged in protected activity. Circumstantial evidence is "evidence that tends to prove a fact by proving other events or circumstances which afford a basis for a reasonable inference of the occurrence of the fact in issue." Webster's New Collegiate Dictionary 203 (1975) [hereinafter Webster's Dictionary]. In the context of a discrimination case, relying on circumstantial evidence means that the requisite factual

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[3] The question of the degree to which the protected activity must be a consideration in the employer's determination to take an adverse action so as to be a "contributing factor" is discussed further in section I.C.2 below.

finding that adverse action was taken because of the protected activity would be the product of a reasonable inference drawn from other proven events or circumstances in the case.

In so describing what is often the central supporting material in discrimination cases, it should not be supposed that because the information is circumstantial, the cases are somehow rooted in weak or deficient evidence. All cases, including a criminal case that must be proven with the highest degree of certainty, i.e., beyond a reasonable doubt, legitimately can be based wholly on circumstantial evidence. Indeed, such evidence, often the result of a painstaking exercise in drawing inferences (or more specifically reasonable inferences) based on the factual circumstances that are presented, can be as convincing as the "smoking gun."

One other comment is appropriate regarding the nature of circumstantial evidence. Based as it is upon the ability to draw "reasonable inferences," it is a somewhat subjective notion. As is often said, "reasonable people can differ." Thus, there is room for judgments to diverge about the extent to which any given circumstance or set of circumstances is sufficient to create an inference about the fact in issue, i.e., in section 50.7 discrimination cases, whether there is a sufficient causal nexus between the protected activity and the adverse action.

2. Evidentiary Basis for Enforcement Action

With this background, the question remains about the basis on which a decision should be made whether there is sufficient evidence to institute an enforcement action in a section 50.7 discrimination case, particularly with regard to the problematic fourth element. This being said, there appear to be four possible "burden of proof" constructs within which to frame a decision about whether there is sufficient evidence to conclude that a violation of section 50.7 occurred. In ascending order of difficulty these are: (1) the prima facie case; (2) preponderance of the evidence; (3) clear and convincing evidence; (4) beyond a reasonable doubt. And in the context of a discrimination case relative to the question of whether an adverse action was taken because of a protected activity, they might be summarized as follows:

a. Prima facie case -- is there evidence that shows temporal proximity between the protected activity and the adverse action (as this standard is utilized in DOL discrimination cases, described further below, this is usually one year).

b. Preponderance of the evidence -- it is more likely than not (more than a 50-50 case) that the adverse action was pretextual or that protected activity was a "contributing factor" in the adverse action.

c. Clear and convincing evidence -- is there evidence that shows with reasonable certainty or a high probability that the adverse action was

pretextual or that the protected activity was a "contributing factor" in the adverse action.

d. Beyond a reasonable doubt -- is there evidence that is clear, precise, and indubitable or that establishes to a moral certainty that the adverse action was pretextual or that the protected activity was a "contributing factor" in the adverse action.

From this group, the most obvious candidate is the preponderance of the evidence standard. As the OGC memorandum correctly indicates, this is the standard to be applied if an administrative hearing is held on an agency enforcement case charging discrimination. In contrast, invoking the clear and convincing evidence or beyond a reasonable doubt standards seems unnecessary. Either would put the agency to a higher standard of proof to lodge a charge than it would need to actually prove that charge if it is challenged. It is not apparent why imposing this burden on the enforcement process might be warranted.

So too, the lower standard used to establish a prima facie case seems inappropriate. That standard is used in cases brought before DOL under section 211 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851, both in making a decision to institute an agency investigation of an employee's discrimination complaint and in the initial stages of the administrative hearing regarding the validity of the individual's challenge. In DOL hearings, the shifting allocation of burdens that begins with the complainant's need to establish a prima facie case recognizes the inherent difficulty an individual faces in bringing a case that is likely to be based on circumstantial evidence about unspoken motivations. As similarly is true in the equal employment opportunity (EEO) arena, providing that only a prima facie case must be established to shift the burden back to the employer to show it did not act improperly "is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 n.8 (1981). In DOL cases, the prima facie case generally is established by utilizing a inference (or presumption) based on temporal proximity. Once established, the employer is then required to show that the adverse action was motivated by legitimate, nondiscriminatory reasons. Ultimately, however, the burden rests on the complainant to show by a preponderance of the evidence that the employer's adverse action was taken because of the employee's protected activity.

In the context of NRC discrimination cases, one of the significant justifications for the burden shifting that is at the heart of the prima facie case seems to be lacking. With its resources and access to licensee employees and documentation by way of its investigative processes, this agency should be able to look into allegations of discrimination in a way that allows development of a significantly more concrete evidentiary record than the average employee in a DOL hearing. Accordingly, it makes sense for the decision about whether there is a sufficient evidentiary basis to proceed to be based on an assessment of how strong the case is in relationship to the ultimate

standard of proof -- preponderance of the evidence. Compare U.S. Department of Justice, Principles of Federal Prosecution 5-6 (July 1980) (government attorney should commence or recommend federal prosecution if he or she believes that a person's conduct constitutes a federal offense and that admissible evidence will probably be sufficient to obtain a conviction).

Accordingly, in assessing these and other discrimination cases, we believe the appropriate "evidentiary" standard should be:

> Whether, 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.

In the context of this standard, as the OGC memorandum suggests, Attachment 1, at 2 n.1, we would consider the "available evidence" to include all the information accessible to those making the enforcement decision, regardless of whether it would be considered admissible in an adjudicatory hearing.[4] Further, we note that, because this standard is based on a "reasonable expectation" of what can be shown, there is room for differing informed judgments about when the requisite expectation has been fulfilled.

C. Additional Considerations

Having outlined this general standard, we think two additional, related points require some mention.

1. Evidentiary Basis to Charge Company v. Individual Company Officials

From the information gathered as part of the OIG investigation, there seems to be some uncertainty about whether there is a difference in the evidentiary standard when enforcement action is being considered against a company, as opposed to the company employees who are alleged to have been the actors in the adverse action. There is a suggestion that, for the latter, there should be a somewhat higher standard, going more toward the clear and convincing side of the evidentiary spectrum. As far as we can ascertain, however, the applicable statutory or regulatory provisions regarding discrimination do not distinguish between the company and its employees in terms of

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[4] As the OGC memorandum appears to recognize, see Attachment 1, at 3, making a decision based on "available" rather than "admissible" evidence does not relieve those entrusted with making the decision on whether to go forward from candidly considering the strength of that evidence, which should include possible admissibility problems. In the administrative context, however, "admissibility" is a more flexible concept that allows the use of evidence, such as hearsay, that would not be permitted in a judicial proceeding. See, e.g., Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-863, 25 NRC 273, 279 (1987).

culpability or liability. Accordingly, in both instances, the evidentiary standard must be the same.

What may lead to different treatment is the exercise of enforcement discretion. Even with a determination that there is an adequate evidentiary basis for finding a violation, as the Enforcement Policy indicates, the agency has wide discretion in determining when to act against companies or individuals that violate its requirements. Relative to discrimination cases, any number of factors may be relevant to bringing charges against individuals, including the seriousness of the violation, whether the individual has committed previous violations, and the company's efforts to correct any violation both as to the company employee involved in the adverse action and the employee who was the subject of the action.

Ultimately, it is important not to confuse the standard being utilized to determine whether a case has a sufficient evidentiary basis to go forward and the associated exercise of enforcement discretion to ensure that all applicable agency policy and resource considerations are given appropriate consideration.

2. Protected Activity as a "Contributing Factor" in Dual Motive Cases.

As we have already noted, in "dual motive" cases the question that must be confronted is whether the protected activity was a "contributing factor" in the adverse action. It might be asked, however, what is the meaning of "contribute" in terms of the quantitative or qualitative addition that the protected activity made to the decision to bring an adverse action?

One suggestion we encountered was to apply a "but for" analysis, whereby one would find the protected activity to be a contributing factor if one could reasonably conclude that "but for" the protected activity, the adverse action would not have been taken. This, however, seems to set the bar too high, because it essentially requires that the protected activity be a predominate reason for the adverse action. On the other hand, if the protected activity played a role in the adverse action that was the equivalent of adding "a drop of water into the ocean," would that provide a sufficient evidentiary basis for going forward? Common sense suggests that it must be something more.

"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.

II. ANALYSIS OF CASES

A. Case Review Process

In accordance with the directive in Chairman Jackson's January 28, 1999 memorandum, the review team evaluated three OI cases involving discrimination allegations. Although all the team members and team advisors familiarized themselves with each of the cases, an individualized, in-depth review of each of the cases was conducted by a single team member or advisor who provided a report on his or her conclusions.

For these in-depth studies, the case reviewer had available the OI case report; all supporting exhibits; the OI investigative file for the case, which included correspondence and investigator notes; and the OE file for the case. In addition, relative to Case Nos. 1-96-002 and 1-97-007, team personnel conducted interviews with the OI investigators with principal responsibility for those cases to clarify questions about the scope of the investigation that was conducted. Further, relative to Case No. 1-96-007, the in-depth review included consideration of the October 2, 1996 NRC Task Force Report and associated attachments; a December 10, 1997 OI Investigator memorandum; the investigative report in another OI case, No. 1-90-001, along with two interview reports conducted in connection with that case; and a February 4, 1999 letter to Chairman Jackson from one of the allegers. Also in connection with that case, the team reviewed additional comparative information regarding the employees who were in the final pool considered for termination that OIG obtained from NU as part of the inquiry that resulted in the OIG December 1998 report. Finally, also considered in Case No. 1-96-002 were SECY-98-292, Proposed Staff Action Regarding Alleged Discrimination Against Two Employees at Northeast Utilities (EA 98-325) (Dec. 21, 1998); Commissioner vote sheets concerning that SECY paper; and letters dated January 19, January 27, February 9, and February 23, 1999, from one of the allegers to OIG that were referred to the review team for its consideration.[5]

Besides this case specific information, team personnel also reviewed various "generic" documents in an attempt to acquire an understanding of the overall situation at Millstone during the relevant time period. These included: Confirmatory Order Establishing Independent Corrective Action Verification Program (Effective Immediately) (Aug. 14, 1996); NRC Office of Nuclear Reactor Regulation, Millstone Lessons Learned Task Group Report, Part 1: Review and Findings (Sept. 1996); Order Requiring Independent, Third-Party Oversight of Northeast Nuclear Energy Company's Implementation of Resolution of Millstone Station Employees' Safety Concerns (Oct. 24, 1996) [hereinafter October 1996 Order]; SECY-97-036, Millstone Lessons Learned Report, Part 2: Policy Issues (Feb. 12, 1997); SECY-98-090, Selected Issues Related to Recovery of Millstone

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[5] OIG advised the team that the alleger was informed of the referral of the January 1999 letters.

Nuclear Power Station Unit 3 (Apr. 24, 1998); SECY-98-119, Remaining Issues Related to Recovery of Millstone Nuclear Power Station, Unit 3 (May 28, 1998); SECY-99-10, Closure of Order Requiring Independent, Third-Party Oversight of Northeast Nuclear Energy Company's Implementation of Resolution of the Millstone Station Employees' Safety Concerns (Jan. 12, 1999); Transcript of Meeting on Status of Third Party Oversight of Millstone Station's Employee Concerns Program and Safety Conscious Work Environment (Jan. 19, 1999).

Each of the individual case studies was subjected to critical analysis by all team personnel. The case studies have been adopted by all of the team members and, as is noted above, each has been endorsed by the team's advisors.

B. Discrimination at Northeast Utilities

As is noted above, each of the three cases assigned for independent review was evaluated in terms of its individual merits as reflected by the documentary and testimonial evidence obtained in the course of the OI investigation. Nonetheless, given the circumstantial nature of the body of that evidence, in reaching a conclusion respecting whether discriminatory action on the part of NU management occurred it was necessary in each case to draw inferences from the established facts.

This function was undertaken against the background of an order issued in late 1996 on behalf of the Commission by the Acting Director of the Office of Nuclear Reactor Regulation with regard to the operating licenses held by NU for the three Millstone units. As noted in its caption and further developed in its text, the order imposed a requirement that there be independent, third-party oversight of NU implementation of a mandated "comprehensive plan for reviewing and dispositioning safety issues raised by [its] employees and ensuring that employees who raise safety concerns are not subject to discrimination." October 1996 Order at 7.

As justification for imposing the requirement, the order observed that it was addressing "past failures in management processes and procedures for handling safety issues raised by employees, and in ensuring that the employees who raise safety concerns are not discriminated against." Id. at 2. The order went on to note the Commission's concern regarding the manner in which NU "has treated employees who brought safety and other concerns to the attention of [its] management." Id.

Still further, the order pointed to NU completion in January 1996 of its review of "the effectiveness of its Nuclear Safety Concerns Program (NSCP) in taking corrective actions related to employee concerns and ensuring that the employees who raise concerns are treated appropriately." Id. at 3. According to the order, that review led to findings "similar to those of previous [NU] assessments, studies and audits performed since 1991." Id. at 4. Among those "common findings" was one to the effect that management "tended to punish rather than reward employees who raised safety concerns." Id. Moreover, the review disclosed that many of the past problems it

identified still existed because prior recommendations had not been implemented "in a coordinated and effective manner." Id.

The cases before us involve allegations of discriminatory action in 1993, 1995, and 1996, respectively. Thus, they called for an examination of events occurring in the period during which, according to the Commission order, there were significant deficiencies in the manner in which NU was treating employees who raised safety concerns.

Standing alone, that consideration could not be deemed dispositive in assessing the merit of the allegations at hand. Stated otherwise, it does not necessarily follow from the fact there may have been numerous instances of discriminatory action in the relevant time period that the individual allegers with whom we are concerned were among the victims.

At the same time, however, the revelations contained in the Commission order manifestly could be taken into account in circumstances where the OI investigation was found to have produced sufficient independent evidence to support an inference that a nexus existed between the alleger's dismissal or demotion and the protected activity in which he had previously engaged. More specifically, NU's unenviable track record in dealing with employees who had raised safety concerns could properly serve in such circumstances to buttress the independently drawn inference of improper management conduct. Additionally, although seemingly not the situation in any of the cases at hand, had the OI record allowed a choice between equally plausible opposing inferences respecting the likelihood that protected activity was an influencing factor in the adverse personnel action, that track record might well have tipped the balance in favor of a finding of discrimination.

Against this backdrop, we provide the following synopsis of our review and conclusions regarding each of the three cases.[6]

C. Case No. 1-96-002

OI Case No. 1-96-002 involved two supervisors who were demoted in the course of a "reintegration," i.e., reorganization, of NU's nuclear engineering functions in November 1993. Both employees maintained that their demotions, to the positions of senior and principal engineer, respectively, were prompted by the fact that they had raised and championed a variety of safety issues in the two years preceding the reorganization. Indeed, just days before the announcement of the reorganization, both had raised

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[6] In connection with the foregoing discussion, we note that the totality of the record before us does not support the conclusion that discriminatory circumstances at NU were so "pervasive and regular" with respect to the individual allegers as to constitute a "hostile work environment" as that concept is outlined in the OGC guidance memorandum. See Attachment 1, at 2.

controversial safety issues with the vice president who presided over the process that led to their demotions.

The reorganization involved not merely first-level supervisory positions such as those held by the employees here involved but, as well, higher-level positions including those held by vice presidents. The process of determining with whom the various positions would be filled was, however, not the same in all instances.

In the case of managers, directors, and vice presidents, each candidate for such a position received a formal assessment based upon the consideration of a number of competency factors and a numerical rating that ultimately influenced the placement decisions. In the case of the first-level supervisory positions, however, there was no equivalent evaluation of employees who were supervisors at the time. The selection for those positions was made from a pool consisting of incumbent supervisors and employees who either had some experience as acting supervisors or no supervisory experience at all. The managerial potential of only the forty to fifty employees not in supervisory positions was assessed. Those employees were then ranked in four quartiles.

The actual supervisory position selections were made at a meeting presided over by a vice president and attended by, among others, persons who had already been tapped for director positions in the reorganized engineering structures. Apart from the quartile ratings for the potential supervisors, there was no written material -- such as performance appraisals -- available to the selecting officials. Moreover, it appears that, in order to receive any consideration, a candidate had to be proposed by one of those officials. According to the presiding vice president, the objective of the selection process was to determine which candidates would be the "best fit" in the positions that survived the reorganization.

Whether or not the names of the two allegers were ever mentioned, the OI record indicates that apparently neither received any consideration at all. In the totality of the circumstances disclosed by the OI record, we concluded that it could and should be inferred that this failure was influenced by the employees' prior protected activity. Among other things, both individuals had strong performance appraisals that reflected attributes that would appear to have been what was being sought in the quest for the "best fits." Beyond that, one of the allegers was replaced as a supervisor by an individual (a prior mere acting supervisor) who was not shown to have possessed qualifications lacking in the alleger.

All in all, the officials involved in the selection process did not supply a credible explanation respecting why neither alleger was worthy even of consideration for retention in supervisory positions in which they had performed well in the past. Given the totally subjective nature of the selection process for supervisory positions, this shortcoming could be deemed pivotal on the question of whether their protected activity influenced their non-selection.

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.

D. Case No. 1-96-007

OI Case No. 1-96-007 involved three individuals whose employment was terminated in January 1996, along with ninety-nine other employees, as part of a workforce reduction program. Each employee alleged that his inclusion in the reduction was brought about by reason of his involvement in protected activity.

Employees under consideration for termination under the workforce reduction program were evaluated and ranked, on a matrix, with their peers in a number of specific areas of competence. With input from their supervisors, managers were responsible for completing the matrices and were to base their scores on the employee's last two performance reviews and a prediction of how the employee was likely to perform in the future organization. The review procedure in connection with the completed matrices included an examination of those of certain employees who had raised safety concerns. The purpose was to ensure that they had not been targeted specifically for reduction. The three allegers were on this so-called "added assurance" review list.

In the case of the division in which each of the allegers was employed, it was ultimately determined that a total of four employees were to be terminated. On the basis of their low relative rankings on the matrices, the allegers were included in that group.

Because the matrices of the employees not terminated were destroyed in the interim, an inquiry into whether there was invidious disparate treatment of the allegers has been foreclosed. The OI record, however, not only confirmed that the allegers had faired poorly in the evaluation process, but also negated any suggestion that their low rankings might have had discriminatory underpinnings. The content of their matrices was furnished by first and second-level supervisors without any discernible reason to provide the allegers with unjustifiable low evaluations in retaliation for their protected activity. More important, peers of all three allegers confirmed the existence of performance shortcomings that readily justified the rankings that were given to them. There was some suggestion that the vice president in charge of the division in which they worked may have acted against them because of his knowledge either of the past involvement of two of the allegers with a well known Millstone whistleblower or as a result of his service on a board that reviewed the other alleger's appeal of his 1994 performance evaluation. In the totality of circumstances, however, we could not discern a sufficient basis for a finding that the protected activities of one or more of the allegers was a factor involved in their inclusion in the workforce reduction.

In this regard, we have considered the concerns expressed by the NRC Task Force and the OI investigator with principal responsibility for this case. On analysis of these concerns, our assessment of the record before us remains unaltered.

Consequently, we have concluded with respect to this case that, based on all the available evidence, there is not information sufficient to provide a reasonable expectation that a violation of section 50.7 can be shown by a preponderance of the evidence.

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-formulated 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 superior 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 to a performance improvement plan would have served no good purpose. (Subsequently, a grievance committee ordered his reinstatement on the ground 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 early 1980s 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.

III. ENFORCEMENT RECOMMENDATION

The question remains as to whether enforcement action should be taken in either or both of the two cases in which we have concluded that NU management personnel discriminated against subordinates because they engaged in protected activities. If taken, that action could be directed against either or both the licensee and the discriminating managers.

Manifestly, the question is essentially one of the appropriate exercise of enforcement discretion and, as such, brings policy considerations into play. Moreover, some of those considerations -- for example, the best utilization of what are doubtless limited agency resources -- clearly are beyond our ability to evaluate. We thus must confine ourselves to what can be said based upon our understanding of the philosophy undergirding the Commission's enforcement policy, as well as of significant developments occurring since the determined discriminatory actions took place in 1993 and 1995, respectively.

A. Enforcement Policy Regarding Discrimination Cases

A reading of the totality of the General Statement of Policy and Procedures for NRC Enforcement Actions, NUREG-1600, Rev. 1 (May 1998), 63 Fed. Reg. 26,630 (1998) [hereinafter NUREG–1600], confirms the remedial nature of such actions. In the context of discriminatory misconduct such as that found to have occurred in the two cases here, the foundation of the enforcement policy appears to be the recognition that retaliation against employees who have raised safety concerns poses a significant actual or potential threat to the public health and safety. Accordingly, it is important where wrongdoing of that stripe has been uncovered that measures be taken designed to ensure that there is not a repetition on the part of the licensee and its managers. Further, it is equally important that the message be clearly conveyed to other NRC licensees and their managers that retaliatory adverse personnel actions are a very serious matter and cannot and will not be tolerated by this agency.

B. Relevant Factors in Implementing Policy

If this understanding is correct, the pivotal inquiry is into whether, in the circumstances at hand, enforcement action against NU and/or its offending managers is warranted in the furtherance of the dual purposes at the root of the enforcement policy as it applies to discrimination cases. In approaching this question, we have taken note of three documents of seeming relevance: (1) the previously discussed October 24, 1996 Commission order in which NU was directed to take certain specific steps designed to rectify prior misconduct in the treatment of employees who had voiced safety concerns; (2) the transcript of an open Commission meeting held on January 19, 1999, regarding possible closure of that order; and (3) the March 9, 1999 staff requirements memorandum (SRM) approving the staff's recommendation to close out the October 1996 order.

1. October 1996 Order

As earlier noted, the backdrop of the October 1996 order was a several year history of retaliation by NU managers against employees who engaged in protected activity; as stated in the order, one recurrent finding was to the effect that the management "tended to punish rather than reward employees who raised safety concerns." This state of affairs prompted the Commission to order NU to put in place an independent, third-party oversight of its implementation of a mandated "comprehensive plan for reviewing and dispositioning safety issues raised by [its] employees and ensuring that employees who raise safety concerns are not subject to discrimination." See supra p. 10.

2. January 1999 Commission Meeting

The January 19 Commission meeting -- conducted more than two years after the October 1996 order was issued -- addressed specifically the matter of the status of the third-party oversight of Millstone Station's Employee Concerns Program (ECP) and safety conscious work environment (SCWE). The participants in the meeting included, in addition to a number of NU officers assigned to the Millstone facility, officials of Little Harbor Consultants, Inc. (which conducted the independent third-party oversight), members of the Millstone Ad-Hoc Employee Group, and senior members of the NRC staff.

At the outset of the meeting, Chairman Jackson referred to the October 1996 Commission order and to events in the wake of that order. Among other things, she noted that, with Commission approval, NU had selected Little Harbor Consultants to conduct the third party oversight. Since May 1997, approximately a dozen meetings had been held between NU, Little Harbor, and the NRC staff to discuss the status of the mandated NU comprehensive plan embracing the ECP and the SCWE. The purpose of the January 1999 briefing, she indicated, was to collect information to assist the Commission in deciding "whether to close the October, 1996 order." Tr. at S-5 to S-8.

After entertaining the views of NU senior management who expressed the belief that the comprehensive plan was achieving the desired results, Tr. at S-8 to S-75, the Commission invited Little Harbor's appraisal. In response, John Beck, its president, first outlined the specific functions that Little Harbor had undertaken in carrying out the assigned mission. Tr. at S-76 to S-78. He then stated categorically that he supported the lifting of the October 1996 order. Tr. at S-78 to S-79. In his words: "We genuinely feel that we are no longer needed on a full time basis to assure that Millstone management does the right thing when challenged by those events which occur in everyone's work place. We further believe that Millstone management is committed to keeping it that way in the future." Tr. at S-79.[7] This assessment was essentially

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[7]The Commission was told that NU nonetheless planned to continue to avail itself (continued...)

endorsed by Billie Garde, a Little Harbor consultant involved in the oversight activity. Tr. at S-83.

For its part, the NRC staff concurred in the Little Harbor judgment that the strictures of the October 1996 order were no longer required. Tr. at S-89 to S-120. And the three representatives of the Millstone Employees Ad-Hoc Group were generally positive respecting the effectiveness of the corrective measures taken in fulfillment of that order. Tr. at S-128 to S-147.[8]

3. Closure of October 1996 Order

Subsequently, in apparent agreement with the appraisals of NU, the staff, Little Harbor, and the Millstone Employees Ad-Hoc Group, in a March 9, 1999 SRM concerning SECY-99-10, the Commission approved the staff's recommendation to close the October 1996 order. In doing so, the Commission directed the staff to be vigilant in monitoring NU's performance in the ECP and SCWE areas to ensure any performance decline is detected early on.

C. Timing of Enforcement Action

As is apparent from the foregoing, over two years before the determination of wrongdoing that we now make in Cases Nos. 1-96-002 and 1-97-007, the Commission took action against NU that, in its effect, applied directly to such wrongdoing. This was, of course, a very unusual sequence of events insofar as concerns the customary Commission response to allegations of discrimination flowing from protected activity.

Normally, the consideration of possible Commission enforcement action addressed to a particular alleged violation of the employee protection provisions of 10 C.F.R. § 50.7 does, as it must, abide a finding that the allegation is meritorious. Only upon such a finding can it be appropriately determined what, if any, sanction against the licensee and/or the offending managers should be imposed in the fulfillment of the purposes underlying the enforcement policy as applied to section 50.7 violations.

As seen, two factors turned the normal process on its head in this instance. First, by 1996 it had become clear to the Commission that there had been for many years an unhealthy NU environment respecting the treatment of employees engaged in protected

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[7](...continued)
of Little Harbor's services on a part-time basis. Tr. at S-21, S-80.

[8] Other witnesses, including representatives of the State of Connecticut Nuclear Energy Advisory Council and Friends of a Safe Millstone, expressed the view that it was desirable to continue Little Harbor oversight on an "on call" part-time basis. Tr. at S-123, S-146.

activities. As a consequence, corrective action in the form of the NU implementation of a broad-scale remedial plan under independent third-party oversight was ordered in that year. Second, while the umbrella of the decreed corrective action extended to the allegations of 1993 and 1995 wrongdoing in Cases Nos. 1-96-002 and 1-97-007, respectively, it is not until 1999 that those allegations are being upheld. As of this time, the corrective action has been in progress for over two years and, according to all those involved in its implementation (NU), its oversight (Little Harbor), and its regulatory appraisal (NRC staff), has successfully accomplished its intended objective, an assessment with which the Commission seemingly agrees.

D. Recommendation

1. Completed NU Remedial Actions Make Enforcement Action Unnecessary

In the final analysis, it appears that, with the Commission's apparent acceptance of the representations made at the January 19 meeting, as a result of agency action taken on the basis of a generic determination of wrongdoing the misconduct found in the two cases under consideration was adequately remedied before those findings surfaced.[9] In that extraordinary circumstance, there is reason to question what worthwhile purpose might be served by taking further, formal enforcement action against either NU or its managers responsible for the 1993 and 1995 discrimination. The October 1996 order conveyed a strong message to NU respecting the unacceptability of the conduct addressed in it and, among other things, put NU to the considerable expense of arranging for independent third party oversight. That message seemingly has had its desired result insofar as regards NU and doubtless was not lost on other reactor licensees.[10] That being so, any additional sanction imposed at this time -- such as the imposition of a civil penalty -- might be thought to be more punitive in character than remedial.

2. Enforcement Action if Completed NU Remedial Actions Are Found to be Insufficient as Basis for Foregoing Enforcement Action

Should the Commission nonetheless not be satisfied that the misconduct found in the two cases under consideration has already been totally remedied, as we explain below

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[9] In addition, it should be noted that, in Case No. 1-97-007, an NU grievance committee overturned the termination that we have found had a discriminatory foundation (albeit on other, purely procedural, grounds).

[10] With what is an apparently radical change in the NU environment since 1996 with regard to the treatment of employees raising safety concerns, it is a reasonable assumption that the offending managers in the cases we have reviewed who are still employed by NU have been "given the word" that such conduct is not acceptable and will not be tolerated.

the violations we have identified do appear to warrant escalated enforcement action against the licensee. Additionally, enforcement action against the utility officials involved in the discriminatory activities may be warranted as well.

For Case No. 1-96-002, given our conclusions about the involvement of two mid-level management officials (a director and a vice president, who were third and fourth-level supervisors, respectively), a Severity Level II civil penalty is potentially involved. See NUREG-1600, at 23, 63 Fed. Reg. at 26,652. Moreover, applying the enforcement policy flow chart, id. at 9, 63 Fed. Reg. at 26,638, because NU has been the subject of escalated enforcement action within the past two years, see SECY-98-119, at 13-14, and, in these circumstances, would receive no credit for identification or corrective action,[11] subject to the exercise of discretion,[12] the civil penalty amount potentially would be the Severity Level II base amount ($88,000) plus 100 percent.

For Case No. 1-97-007, because one of the NU officials involved was at the time a mid-level management official (a director, who was third-level supervisor), a Severity Level II civil penalty also potentially is involved. Again, because NU has been the subject of escalated action within the past two years and, in these circumstances, would be entitled to no credit for identification or corrective action,[13] subject to the exercise of discretion, the civil penalty amount potentially would be the Severity Level II base amount plus 100 percent.

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[11] The identification credit appears inappropriate in Case No. 1-96-002 because the agency, not NU, is identifying the violation. In connection with the corrective action credit, the enforcement policy statement indicates that in discrimination cases it should normally be considered only if the licensee "takes prompt, comprehensive corrective action that (1) addresses the broader environment for raising safety concerns in the workplace, and (2) provides a remedy for the particular discrimination at issue." NUREG-1600, at 11, 63 Fed. Reg. at 26,640. For Case No. 1-96-002, up to this point the licensee has not taken any action under the second element, and thus does not appear to qualify for this credit either.

[12] In both cases, there may be significant questions about the appropriate use of limited enforcement resources. As we have previously noted, this is a matter about which we cannot make an informed judgment.

[13] The identification credit appears inappropriate in Case No. 1-97-007 as well because the agency, not NU, is identifying the violation. The corrective action credit also appears inapplicable because under element two -- provide a remedy for the particular discrimination -- although the utility did take action to reinstate the terminated employee through an internal grievance process, that was as a result of a finding unrelated to discrimination. See supra note 9.

With respect to the individuals involved, the agency previously has taken enforcement action against utility officials found to have been involved in discriminatory activities, by issuing either a notice of violation or an order banning the individual from licensed activities for a specified period.[14] A review of significant enforcement actions between January 1990 and June 1998 reveals three instances in which utility supervisors, as individuals, have been subjected to agency enforcement action for being involved in taking discriminatory actions in violation of section 50.7.[15]

As the enforcement policy notes, however, when escalated enforcement action appears to be warranted, the agency may provide the opportunity for a predecisional enforcement conference to obtain further information to assist it in making the appropriate enforcement decision. In this instance, particularly with respect to the individuals involved,[16] such a conference should be convened to ensure that the agency can make a fully informed enforcement decision.

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[14] Although the enforcement policy also indicates that a letter of reprimand may be issued to an individual to identify significant deficiencies in his or her performance of licensed activities, it is our understanding that use of this administrative action is in the process of being discontinued.

[15] In 1995 and 1996 cases -- IA 95-042 and IA 96-015, respectively -- notices of violation for Severity Level II and Severity Level III violations were issued to individuals after OIG or OI and DOL findings of discrimination by their employer based on their actions, and, in one case, a federal criminal guilty plea to violating NRC requirements. In both cases, the staff did not issue an order removing the individuals from licensed activities. In the one instance, the staff indicated this was based on the employer's action removing the individual from such activities, while in the other the staff recognized the significant penalties already imposed, including loss of employment and a felony conviction, as well as the individual's recognition he had acted improperly and understood the importance of the requirements of section 50.7. In the third case, which was brought in 1997 (IA 96-101), an enforcement order was issued against a utility vice president for violating section 50.7 following OI and DOL findings of discrimination by his employer based on his actions. In the enforcement order, which placed a five-year prohibition on his involvement in NRC-licensed activities, it was noted that during a predecisional enforcement conference the utility official continued to insist that he had not taken any discriminatory action.

[16] With respect to the individuals involved, based on the cases previously brought by the agency, a significant factor in making an enforcement decision appears to be the extent to which those individuals are willing to acknowledge wrongdoing.

IV. LESSONS LEARNED

A. Lessons Learned Review Process

In seeking to draw lessons learned from the investigative and enforcement processes used with respect to these cases, and principally Case No. 1-96-007 that was the focus of the December 1998 OIG report, in addition to review of the individual case information outlined in section II.A. above, team personnel reviewed the January 27, 1999 memorandum from the Executive Director for Operations (EDO) outlining staff responses to Chairman Jackson's January 7, 1999 questions concerning the December 1998 OIG report, and conducted interviews with senior officials from OI, OE, and OGC about the general conduct of the agency's investigative and enforcement processes. Team personnel also had discussions with an OIG investigator who was involved in the preparation of the December 1998 report. In this regard, the team was given access to the transcribed interviews of various agency employees taken during the OIG inquiry that led to the December 1998 report.

Based on the information gathered through this process, we provide the following suggestions and recommendations.

B. Lessons Learned

1. Utilization of Millstone Task Force

From what we have been able to gather, the decision to assemble the special task force to begin a review of the 1996 Millstone reorganization apparently was a sound one. What is less clear, however, is whether there was a clear concept of the way in which that group's work was to be utilized and incorporated into the existing investigative and enforcement processes. The seemingly abrupt decision to halt their work, in combination with the belated direction, some five months later, to prepare a report on their conclusions, seems to reflect there was not, at its conception, a plan for integrating the task force into the existing regulatory scheme. This is also reflected by the apparent lack of any concerted effort to include appropriate task force members in all steps of the enforcement process, including the June 1998 final conference on Case No. 1-96-007.

A special task force like that established to review the 1996 NU downsizing effort can serve a valuable purpose by bringing special expertise and insight into the investigative and enforcement processes. As the circumstances surrounding that task force illustrate, however, failure explicitly to define the group's role in the existing agency processes from the outset can effectively nullify its usefulness by creating unnecessary misunderstandings and misperceptions about the validity of any results derived from those processes.

2. OI Investigation

Although as to each of the three cases reviewed, we generally found the OI investigation to be thorough and comprehensive, we were struck by the lack of comment by the investigators regarding their observations of witness behavior or demeanor that would be relevant in assessing the witness' credibility and veracity. Particularly in the context of these discrimination cases that depend on inferences about motives, witness credibility can be a significant factor in assessing the strength or weakness of evidence upon which inferences about discrimination will be based. In discussions with OI, it was suggested that they are reluctant to put such information in reports, but are always willing to discuss such matters with OE or OGC personnel involved in case review. To the degree there is a need for closer coordination between OGC and OI (and perhaps OE as well) regarding case development and analysis, see section IV.B.5 below, we would hope this type of information will be conveyed and affirmatively utilized in making decisions about whether there is an adequate evidentiary basis to proceed with particular discrimination cases.

3. Department of Justice (DOJ) Interaction

Another apparently unique aspect regarding the various discrimination cases relating to Millstone is the request from the local United States Attorney's Office that OI investigative reports relating to referred Millstone discrimination allegations not include a summary of conclusions. The apparent basis for this request was previous leaks of this information coming from within the NRC that the federal prosecutors perceived was interfering with their ability to conduct their prosecutorial assessments.

While the decision not to forward OI summaries for these reports was appropriate, the apparent decision not to even prepare those summaries is questionable. The process of analyzing the mass of information generated in the course of investigations such as those at issue here in order to prepare a thorough, reasoned summary and supporting conclusions is a vital part of the process. Notwithstanding the problem of leaks, it does not seem that preparing such a summary, retaining it within OI until DOJ has finished its review of the report, and then attaching the summary (with any additional supplementation that might be necessary based on the DOJ review) as the report goes forward for consideration as part of the agency enforcement process is likely to cause the problem identified by DOJ relative to Millstone.[17]

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[17] The January 27, 1999 EDO response to Chairman Jackson's January 7, 1999 memorandum regarding the December 1998 OIG report indicates that "OI will provide written conclusions and synopses <u>after</u> DOJ returns the case to NRC." Jan. 27, 1999 Memorandum from William D. Travers, EDO, to Chairman Jackson, attach. 1, at 1 (emphasis supplied). So that the analytical process is complete, we think it is important the conclusions be drafted at the same time the report is prepared, even if they are not "attached" until later.

Although acknowledged in the OIG report, it is worth mentioning again that the lack of any investigatory summary here apparently had another, albeit again unintended, detrimental impact on the process. OI has a policy in its manual that governs the resolution of disputes between investigators and OI managers. See OI Procedures Manual at 32-33 (Aug. 1996). As the OIG report indicates, however, that policy was not utilized to address the apparent conflict between the OI investigator and the Field Office Director over the sufficiency of Case No. 1-96-007 because the report did not contain a written conclusion. See OIG Report at 10. This is unfortunate, since a more direct confrontation of the problems of this case at an earlier stage through this policy might have surfaced at a much earlier point the uncertainties that ultimately led to the position reversal that raised concerns about the overall integrity of the enforcement process.

4. Enforcement Conference Process

As we have noted, because they involve drawing inferences about the generally unexpressed motives of individuals, discrimination cases are among the most difficult agency enforcement matters. Especially concerning the critical question of whether there is a sufficient "causal nexus" between the protected action and the adverse action, these cases require a careful analysis of the factual record -- determining what the relevant facts are and how they are to be weighted, compared, and contrasted -- to reach a conclusion.

Enforcement Guidance Memorandum (EGM) 99-001, which is included as Attachment 2 to the January 27, 1999 EDO response, provides guidance intended to ensure that Enforcement Action (EA) Request and Enforcement Strategy Forms now used as status and briefing aids at staff enforcement conferences more accurately reflect what occurs during, and the outcome of, these conferences. This certainly addresses the recordkeeping concern identified by the OIG report. There is, however, another, perhaps more substantive concern, that appears to remain regarding the enforcement conference decisional process as it relates to discrimination cases.

From the most recent draft of Staff Requirements Memorandum (SRM) M990115, it appears the Commission is considering requested that in future enforcement papers to the Commission, the staff clearly state (1) the criteria it used to determine whether a violation occurred and the facts and analysis relied on to reach that conclusion; and (2) in the event of differences between OE and OI, the basis for OE's ultimate recommendation, including a supporting analysis. We think, however, that particularly for the concededly difficult discrimination cases, consideration should be given to starting this "articulated analytical process" at the inception of the enforcement process, not just when these matters reach the Commission.

What we contemplate for discrimination cases is a process, beginning at the enforcement panel stage, in which there is some attempt by the major participants -- e.g., OI, OGC, and OE -- to set out briefly in writing the analytical framework for their tentative conclusions regarding a particular discrimination allegation. The construct we have

described in section II.A. above (supplemented to address other relevant factors) could provide a template for such an analysis, with the length being something along the lines of the case summaries that are set forth in section II.C.-E of this report.

The OI investigation report (with conclusions) seemingly could constitute the articulated analysis for that office.[18] OGC and OE likewise would be expected to provide some concise written explanation of their analysis of the facts provided in the OI report. These office products arguably would provide a more focused basis for the subsequent enforcement conference discussions.

To be sure, there are personnel resource and timeliness implications to this approach, to say nothing of the general antipathy to further "papering" what in may instances are already voluminous records. On the other hand, given the significance of discrimination cases in the overall investigative caseload, see section IV.B.5 below, this additional "up front" work might well provide the benefit of requiring less "clean up" labor later in the enforcement process.

5. OGC Involvement

On the basis of disclosures in the OIG investigation, there may be room for reassessing the OGC role in determining whether to take enforcement action in a particular case of alleged discrimination.[19] It appears that, at least in the time period relevant to our inquiry, in many instances OGC confined itself to a notation that it had "no legal objection" to the institution of a particular enforcement action. That notation, as we have been led to understand it, did not mean that the OGC enforcement attorneys who had reviewed the case file had concluded that the case for enforcement was strong, i.e., that, should it be litigated, the proposed penalty would likely be upheld.[20] All that "no legal objection" appears to have meant was what was literally stated: whether or not justified on the established facts, no illegality would be involved in bringing an enforcement action.

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[18] It is our understanding that, at least in some of the regional offices, a separate written case analysis is prepared by regional officials prior to an enforcement conference, which also could continue to be provided for the conference.

[19] In making this recommendation, it should be understood that we are not critiquing the way in which OGC enforcement attorneys or supervisors have performed their duties in any individual case, given the institutional construct in which they were operating. Rather, what we suggest is a concern about the nature of the framework within which they labor.

[20] To the contrary, the attorneys might have concluded that the case was so weak that, in the words of one OGC lawyer interviewed during the Office of Inspector General's investigation, bringing an enforcement action would be "a dumb thing to do."

When so confined, as it may well have been in connection with the December 1997 enforcement panel meeting in which it was decided to proceed with enforcement in Case No. 1-96-007, such OGC participation is not as helpful as it might otherwise be. Given the fact that at least one OGC enforcement attorney has reviewed the entire case file, the role of that office might extend far beyond simply venturing an opinion on whether an enforcement action would or would not be legally precluded. Rather, we know of no good reason why OGC should not provide OE with its considered judgment as to whether an enforcement action is not only legally permissible, but also warranted under whatever evidentiary standard the Commission has adopted as a basis for taking such action.[21]

On the basis of oral briefings we received with regard to the role OGC attorneys play in giving advice to OE and OI in cases involving alleged violations of section 50.7, it appears that the situation indicated by the OIG investigation may now have changed. Specifically, we have been given reason to believe that, at present, OGC enforcement attorneys may be assuming a more proactive role in providing their views on the strengths and weaknesses of particular cases as illuminated by the record amassed in the course of the OI investigation. If so, the process of reaching an informed judgment on whether a section 50.7 violation worthy of enforcement has occurred will have been benefitted.

We also note that, according to the information we were given by OI, approximately forty percent of the office's total caseload is discrimination cases, with those case types making up sixty-five percent of the high-priority cases. Because discrimination cases are so "fact intensive," i.e., they require a careful development and sifting of the facts to determine what reasonable inferences can be drawn, earlier involvement on the part of OGC attorneys (and perhaps OE personnel) may well be useful, arguably from the investigation's inception. In one of our oral briefings, OGC indicated that in the context of a planned office reorganization, it is considering assigning discrimination cases with the anticipation that the attorney who advises on the case during the investigative/enforcement process will be the attorney responsible for trying the matter should it go to an administrative hearing.[22] This undoubtedly would help to ensure that

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[21] OGC would not, of course, be called upon to pass upon such policy questions as whether it would be an appropriate exercise of prosecutorial discretion to forego an enforcement action in the circumstances of the particular case.

[22] In this regard, we hope that the seeming need for enhanced interaction between OI and OGC enforcement attorneys, particularly at the outset of the investigative process, would not fall victim to historical concerns about OI independence. The need to maintain OI independence is clear; however, more collaboration between OGC enforcement attorneys and OI investigators to develop the factual construct for enforcement cases, particularly discrimination cases, seems highly desirable.

evidentiary problems are explored thoroughly before any decision to bring enforcement action is made.[23]

6. Handling of Discrimination Cases Generally

As we have already noted, several of those interviewed suggested that the Millstone situation was somewhat unique. It nonetheless seems to us that, with the present state of the electric generation industry in which competition and deregulation are hallmarks, massive downsizings like that which occurred in 1996 can be expected at other utilities in the future. It further seems likely that in such instances, as was the case with Millstone, a number of discrimination complaints can be anticipated. It thus may be a benefit to the agency to have in mind a more systematic approach to handling such events.

As we have indicated in our report on Case No. 1-96-007 relative to the 1996 NU reorganization, the utility's destruction of the matrix information on everyone other than those selected for termination has rendered impossible any attempt to analyze the circumstances based on disparate treatment. Nonetheless, because evidence of disparate treatment may be significant in identifying as pretextual discrimination actions that otherwise might be discounted as "legitimate business reasons," a principal agency concern should be that for a reasonable period of time the utility retains, and the agency has access to, all relevant information regarding those whose positions were implicated in a reorganization/downsizing process. This would include information on all personnel whose positions were considered as part of the reorganization process, whether or not they were (1) involved in protected activity; or (2) actually subjected to an adverse action, such as termination or demotion.

Along these same lines, the agency may wish to consider a more standardized approach relative to identifying and interviewing "comparable" individuals in connection with the disparate treatment aspects of an investigation into a large reorganization. Admittedly, attempting to get a complete picture of what occurred for the purpose of making a disparate treatment analysis often will be very resource intensive. For instance, in Case No. 1-96-002, to get a complete view of disparate treatment would require interviews with perhaps thirty people, including those who were demoted in 1993, those who retained their supervisory positions, and those who were given supervisory positions for the first time. Nonetheless, without obtaining relevant information on a significant number of these individuals, it may be difficult to reach a concrete conclusion about the

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[23] In scrutinizing a claim that a federal executive branch "whistleblower" has been subjected to a prohibited personnel practice, an Office of Special Counsel investigator and the OSC attorney responsible for seeking corrective and disciplinary action through litigation before the Merit Systems Protection Board work closely on the case almost from its inception. Based on his 20 years of experience with the OSC, Supervisory Investigator Hamer has found this interaction is integral to developing and prosecuting such cases successfully.

role of disparate treatment evidence in a particular investigation. Further, although some interviews designed to elicit comparative information were done in Case No. 1-96-002, it does not seem there was a clear idea of exactly what "comparative" information was needed to provide the best analytical basis to reach a conclusion about disparate treatment. Given the similarity of this analysis to that which is regularly used in the EEO context, continuing interaction between those in the agency who handle EEO cases and OI, OE, and OGC enforcement attorneys might provide those on the enforcement side with a better understanding of what is required.

7. Other Matters

The MIRT also received unsolicited suggestions for revisions/improvements to the investigative and enforcement processes from an agency employee and a public interest group with a stated interest in Millstone. One commenter outlined a perceived problem with the job classification used for OI investigators, while the other suggested that OI should again be made a Commission-level office. These appear to be matters that fall outside of the scope of the review we were asked to undertake. Accordingly, absent some further Commission directive, we plan to offer no recommendations regarding either suggestion.

V. CONCLUSION

In reviewing the allegations in OI Case Nos. 1-96-002, 1-96-007, and 1-97-007 that NU management officials violated the prohibition in 10 C.F.R. § 50.7 on taking adverse action against an employee for participating in any protected activity, we have sought to determine whether, 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. A case meeting this evidentiary standard of review is a legitimate candidate for enforcement action, subject to the exercise of discretion in accordance with the agency's enforcement policy.

Further, based upon a review of the available evidence for these three cases, we have concluded with respect to OI Case No. 1-96-007, that there is not information sufficient to provide a reasonable expectation that a violation of section 50.7 can be shown by a preponderance of the evidence. On the other hand, with regard to OI Case Nos. 1-96-002 and 1-97-007, we have determined 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. We do not recommend that enforcement action be instituted in connection with those cases, however, because of the remedial actions already undertaken by NU to address previously identified failures in management processes and procedures for handling safety issues raised by employees, thereby ensuring that employees who raise safety concerns are not discriminated against.

Finally, based on our review of the investigative and enforcement processes utilized by the NRC staff with respect to these OI cases, and in particular OI Case No. 1-96-007, we make the following recommendations regarding those processes:

1. At its inception, any "special" task force formed to investigate or otherwise review circumstances in which agency enforcement action is a possible outcome should have its role within the agency's existing investigative/enforcement processes clearly delineated.

2. Particularly with respect to 10 C.F.R. § 50.7 discrimination cases, to the degree practical, OI investigator impressions regarding witness credibility and veracity garnered though observation of the witnesses should be communicated to those making the decision on whether there is sufficient evidence to pursue enforcement action.

3. Notwithstanding a DOJ request not to transmit an OI summary and conclusion for a case sent for prosecutorial review, the OI summary and conclusion should be prepared at the time the OI case report is assembled and, once the case is returned from DOJ, made a part of the OI report so as to be available as an aid in determining whether agency enforcement action is appropriate.

4. Particularly with respect to 10 C.F.R. § 50.7 discrimination cases, an "articulated analytical process" should be incorporated into the enforcement conference process to the extent practicable.

5. Particularly with respect to 10 C.F.R. § 50.7 discrimination cases, OGC enforcement attorneys should take a more proactive role in the investigative process from its inception, with the expectation that, to the extent practicable, the attorney assigned to an OI case would be responsible for handling the case if it is adjudicated.

6. Anticipating that electric industry deregulation and enhanced competition will produce other large scale reorganization/downsizing efforts, the agency should endeavor to ensure that the utility retains all relevant documentary information regarding all those whose positions are implicated in the reorganization/downsizing.

Respectfully Submitted by
the Millstone Independent Review Team

Original Signed by:

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Acting Chief Administrative Judge
Atomic Safety and Licensing Board Panel

Original Signed by:

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NRC Region II

Original Signed by:

Sara McAndrew
Attorney
Office of the General Counsel

March 12, 1999

SEPARATE STATEMENT
OF
ALAN S. ROSENTHAL

Advisor to the Millstone Independent Review Team [MIRT]

My independent examination of the voluminous product of the OI investigations, as well as of the other documentary materials made available to the review team, leaves me in total agreement with the conclusions reached in the three cases addressed in the team's report. As will be discussed in greater detail below, this is not to say that I would have deemed a contrary conclusion in one or more of the cases to have been beyond the bounds of reason. In each instance, however, the team has provided an analysis of the relevant facts disclosed by the OI investigation that, in my judgment, amply supports the inferences drawn respecting the ultimate question presented: was the adverse personnel action taken against the particular alleger motivated, in whole or in part, by protected activity in which he had engaged?

My agreement with the content of the report extends to the discussion of the evidentiary standard of review, as well as to the enforcement recommendation applicable to the two cases in which the review team has concluded that a violation of 10 C.F.R. § 50.7 had occurred. And it further seems to me that the review team has identified the principal lessons to be learned from what has transpired with regard to these cases.

Notwithstanding my endorsement of the review team's report in its entirety, I offer a few additional observations of my own. In the main, they serve simply to stress portions of the report that I feel warrant additional emphasis.

1. In none of the three cases examined by the review team was it difficult to discern from the OI investigation materials the presence of three of the four elements that, as the review team notes, must undergird a finding of a violation of the employee protection provisions

of 10 C.F.R.

§ 50.7. Each alleger manifestly had engaged in protected activity;[1] there was the requisite management awareness of that fact; and the alleger's termination or demotion was a classic example of adverse personnel action.

Unsurprisingly, the difficult assessment concerned the fourth element: whether the required nexus existed between the protected activity and the adverse action. In approaching that question in each case, there was a recognition of the obvious: the fruits of the OI investigation would not include any acknowledgment of licensee wrongdoing or, in all likelihood, anything that might constitute direct evidence either in support or in refutation of the alleger's claims. Thus, the determination respecting whether the licensee's proffered explanation for the adverse action was genuine, or instead in whole or in part pretextual, would necessarily hinge upon the drawing of inferences from evidentiary disclosures that might well be in substantial conflict.

Such was the situation that confronted the review team as it embarked upon its assigned task. In carrying out that task, it had two marked advantages.

The first, presumably enjoyed whenever the results of an OI investigation are in hand, stemmed from the completeness of the evidentiary record on which the inferences had to be based. There doubtless is no investigation that could not be taken a step further if time and resources permitted. In the three cases before the review team, however, the investigation was

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[1] I would think that employees called upon to perform safety-related functions (as were all the allegers in the cases at hand) inevitably will find it necessary to raise safety issues from time to time in the fulfillment of their responsibilities. Of course, the extent to which they might choose to pursue those issues either internally or with the NRC will vary and might well affect the solicitude of superiors regarding a particular protected activity.

conducted by one or more OI Special Agents with considerable thought and consummate thoroughness. Without being overbearing in their probing, the investigators identified and pursued tenaciously the appropriate lines of inquiry; had no hesitancy in confronting a witness with contradictory statements of another witness; and, in general, sought to develop a record that would enable an informed judgment by the ultimate decision maker on each issue that had to be addressed. In almost 40 years of federal service in three separate agencies, I had occasion to consider and to act upon innumerable investigation reports and their underlying documentation. None surpassed in quality what I encountered here.[2]

Second, and this was an advantage not usually possessed in the assessment of the product of OI investigations, the review team -- consisting of three NRC lawyers -- had available to it six full weeks to analyze these cases and to reach its conclusions.[3] As a consequence, its members and advisors were able to spend innumerable hours in examining the wealth of interview transcripts and documentary exhibits in the OI file; in collegial discussion of the decisional implications of that material; and in the drafting and peer review of the extensive case studies now put before the Commission. This luxury of time and resources is likely not accorded to OE and OGC personnel who customarily must pass judgment on the merits of alleged Section 50.7 violations.

Despite these advantages, I think that the review team members would agree with me that in none of the cases did the answer to the nexus question become obvious from a casual examination of the OI report of investigation and its documentary foundation. (Indeed, in the

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[2] I would hope that, either in their reports or in separate documentation, the OI investigators would supplement the transcripts or summaries of witness interviews with any impressions as to a witness' credibility garnered through observation of his or her demeanor during the interview. Such additional information can be most helpful, particularly in circumstances where there is a clear conflict in the evidence.

[3] This advisor also devoted his entire attention to the project during that period.

case in which I was asked to take an early particularly close look, my first impression as to the likely appropriate response made an 180-degree turn as I gave the matter additional thought.) And, even after all involved in this enterprise had made full use of the time available for study and reflection, there still was room in the instance of at least some of the allegers to be less than fully confident in the choice that had to be made between conflicting possible inferences.

I do not mean to suggest that the conclusions reached by the review team in its case studies are suspect. Once again, I think them totally supported by a cogent analysis based on a full consideration of the pertinent facts as disclosed by the OI investigation. Accordingly, had a like conclusion founded on a like analysis come before me in my time as an adjudicator in this agency and later in the General Accounting Office, I would have had no hesitancy in upholding it. All that I do mean to convey is my belief that cases such as these do not lend themselves to certainty. Whenever the drawing of inferences from inconclusive facts is the order of the day, reasonable minds can and often will differ.[4] Thus, for example, while it may be contrary to the outcome of the review team's analysis (with which I am in full agreement), it does not follow that the conclusion reached by the NRC Task Force in Case No. 1-96-007 is perforce flawed.[5]

2. In two of the three cases examined (Nos. 1-96-002 and 1-96-007), the adverse action taken against the allegers was part of a broad-based restructuring or reduction-in-force involving a significant number of NU employees. Thus, for example, the three allegers in Case No.

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[4] This is especially so where the required inference relates to the state of mind of the management official(s) who took the adverse action alleged to have been discriminatory.

[5] Of course, the Task Force may not have had at its disposal the time and resources available to the review team.

1-96-007 were among a total of over 100 individuals (out of a pool of approximately 3,200) who were terminated as part of a 1996 downsizing effort.

In such circumstances, the issue of disparate treatment would appear on the surface to have been of potentially appreciable significance in determining whether their protected activity was a factor in the decision to include the allegers in the group of employees ultimately selected for termination. Yet, as noted in the review team report (in Section IV. B. 6.), in the instance of Case No. 1-96-007 that issue could not be effectively explored. This was because NU had destroyed the matrix information on all employees other than those terminated -- i.e., there was not available the information as to performance and capabilities that supposedly was central to the decision on which employees should be laid off.

I agree with the review team's recommendation that utilities be required to retain, and make available to the agency as required, all relevant information regarding those persons whose positions were implicated in a reorganization/downsizing process. At the same time, however, it should be recognized that, even had all of that information been in hand, it might well not have proven particularly useful in reaching a disparate treatment conclusion in Case No. 1-96-007.

The data supplied by NU to the Office of the Inspector General at the latter's request revealed, among other things, that 19 of the 43 candidates for layoff who were on an "added assurance" review list were subsequently (albeit not by the reviewers of that list) removed from consideration for termination as part of the reduction-in-force.[6] It was also disclosed that, of the approximately 90 employees who were identified by name as having raised safety concerns with

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[6] That list was comprised of employees who, for one reason or other (such as prior protected activity) were deemed "sensitive" and, as such, merited special examination before being included in the layoff.

either the NU Employee Concerns Program (ECP) or its equivalent predecessor group at Millstone from January 1990 to January 1996, five were included in the "added assurance" review list. Of those five, three were selected for termination. In addition, two employees who had raised safety concerns with the ECP were terminated even though they had not been on the " added assurance" review list.

Presumably, all 19 of the employees on the "added assurance" review list who survived the workforce reduction were among the total of approximately 3,200 individuals subject to evaluation by the matrix process. Additionally, it may reasonably be assumed that, even if they did not turn up on that list, most of the retained persons who had brought safety concerns to the ECP similarly had been assessed as candidates for possible layoff.

The short of the matter thus is that, if the matrices of the several thousand employees who were evaluated but not terminated had been available to the OI investigator and then examined, the results likely would not have justified the formidable time and effort that would have been involved in the examination. The investigator still would have been confronted with the fact that a vast majority of the employees who placed safety concerns before the ECP between 1990 and 1996 were not laid off and, in the more select group of employees receiving special "added assurance" review because of their perceived "sensitivity," almost 50% kept their jobs. This being so, it is difficult to see how a comparison of the matrices of the three allegers in Case No. 1-96-007 (all of whom were on the "added assurance" review list) with those of some or all of the retained employees might have assisted an informed determination on the likelihood that the allegers had been the victims of disparate treatment because of their protected activity.

As it turned out, in Case No. 1-96-007, as well as in the other case involving adverse action taken in the course of a large-scale program involving many employees (No. 1-96-002), it was possible to reach an ultimate conclusion on the Section 50.7 violation issue on bases that did not require an inquiry into the possibility of disparate treatment. In 1-96-007, the low matrix

ranking given to all three allegers, which in turn was supplied as the reason for their inclusion in the reduction-in-force, was sufficiently supported by the appraisal of their peers. Beyond that, nothing uncovered by the OI investigation gave rise to a suspicion that, nonetheless, more probable than not past protected activity was an influencing factor in their termination. Thus, the review team reasonably concluded that any determination that the allegers' layoff was impermissibly motivated would have had a purely conjectural -- and therefore unacceptable -- foundation.

As the review team found, the situation disclosed by the OI investigation in 1-96-002 was markedly different and called for an opposite result. There, the process used in determining who should receive positions as first-level supervisors as part of the 1993 reorganization was both unusual and wide open to the making of choices on bases other than merit. In stark contrast to the matrix process utilized in carrying out the 1996 workforce reduction program, which brought about the evaluation of all candidates for termination, in the 1993 reorganization existing supervisors were not formally appraised at all. Nor, apparently, were they given any consideration for retention as a supervisor unless, at the meeting convened for the purpose of making the selections, one of the management officials in attendance put their names forward.

In the case of the two supervisor allegers in 1-96-002, no official did so. As a consequence, without any discussion of their qualifications, both ended up demoted to line positions and, indeed, one of them found himself subordinated to a newly-created supervisor. Given the fact that the allegers had solid prior performance appraisals in their supervisor roles -- appraisals that, however, were not made available at the selection meeting -- this state of affairs manifestly placed a decided burden upon the management to demonstrate that the demotions had a totally non-discriminatory basis. This burden was not met.

The third case examined by the review team (No. 1-97-007) did not involve a broad-scale reorganization or workforce reduction but, instead, a termination of a single

individual -- the alleger -- for asserted lack of satisfactory supervisory performance. Although two instances of different treatment accorded other employees surfaced in the course of the OI investigation, the review team found them of no probative value. Rather, the conclusion that the alleger's termination was at least partially motivated by his prior protected activity was founded on the responsible management officials' failure to provide an acceptable basis for their claim that his supervisory capabilities and performance were poor beyond the possibility of remedy. Given the totality of the circumstances undermining the explanation offered, the review team found that explanation pretextual.

As I see it, the analytic framework utilized in these three cases has generic value. In a nutshell, while there well may be cases in which disparate treatment can be discerned and a Section 50.7 violation based thereon, I believe that, in most instances, the more useful

exploration will be in another area.[7] Specifically, it will be into whether, taking into account all attendant circumstances, the reasons assigned by the licensee's management as constituting the non-discriminatory basis for the adverse action appear totally credible on their face. If not, and the management is not able to counter successfully the difficulties that inhere in the assigned reasons, an inference that the adverse action was impermissibly motivated (at least in part) both can and should be drawn.

3. Finally, a solid foundation appears to undergird the review team's recommendations regarding enforcement action in the two cases in which it found 10 C.F.R. § 50.7 violations. At first blush, given the unusual step taken by the Commission in chartering an extensive, independent inquiry into these three cases, a failure to pursue found violations might seem anomalous. The fact remains, however, that the Commission addressed in its October 1996 order the hostility that this licensee had demonstrated over the course of years with regard to employees raising safety concerns. If that order has served its intended purpose, as the Commission apparently now believes based on the briefing that took place less than two months

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[7] As noted above (fn. 1), employees engaged in safety-related activities can be expected to raise safety issues in the course of the performance of their assigned functions. Any disparate treatment analysis would have to take this fact into account, as well as the equally obvious fact that not all protected activity will be looked upon by licensee management in identical fashion. For example, it might turn out that the employee suffering the adverse action had presented a claim to his superiors that the reactor was operating unsafely and, when it was rejected by the management, had renewed the claim before this Commission. In deciding whether that conduct had motivated the adverse action, it would be quite beside the point that similar action had not been taken against other employees who either had raised safety concerns of less impact upon the licensee's pocketbook or had readily accepted the management's response to the expressed concerns.

Thus, disparate treatment analyses may require a sophisticated determination respecting precisely which employees should be selected for comparison purposes. This is another reason why I believe that, in many instances, such an analysis might not prove fruitful.

[8] See March 9, 1999 SRM regarding SECY-99-010.

ago[8], it is difficult to quarrel with the review team's conclusion that further enforcement action would have a punitive, rather than a remedial, flavor.

With the Commission's indulgence, I close this brief statement with a purely personal observation. I welcomed the opportunity to return, if but for a very short time, to the agency in which I had served for the better part of two decades. And it was a particular pleasure to have renewed my association with Judge Bollwerk, a member of the Atomic Safety and Licensing Appeal Panel during my last years on that Panel, and to have become acquainted with the other members of the review team.

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[8] See March 9, 1999 SRM regarding SECY-99-010.

UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL
WASHINGTON, D.C. 20555-0001

March 31, 1999

MEMORANDUM TO: Chairman Jackson

FROM: G. Paul Bollwerk, III
Acting Chief Administrative Judge

SUBJECT: CLARIFICATION OF ENFORCEMENT DISCUSSION IN MARCH 19, 1999 MILLSTONE INDEPENDENT REVIEW TEAM REPORT

As a result of the discussions held with you and the Commission regarding the March 19, 1999 report of the Millstone Independent Review Team (MIRT), it became clear that one aspect of the report's discussion required further clarification.

In addressing the enforcement options available to the Commission relative to Office of Investigations Case Nos. 96-002 and 97-007, the discussion in section III.D.1 of the MIRT report was confined to the question of the need for the imposition of a civil penalty or an enforcement order in those cases. For the reasons stated in that section, we concluded that any such need had been obviated by the Northeast Utilities System (NU) response to the agency's October 24, 1996 order as that response had been detailed at a January 19, 1999 Commission briefing. That section was not intended to address the entirely separate question of the appropriateness of agency issuance of a notice of violation (NOV) or a letter of reprimand to NU or any of the individual supervisors involved in those cases and, accordingly, should not be understood as recommending against issuance of an NOV or letter of reprimand.

cc: Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield