

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE DIRECTOR, OFFICE OF ENFORCEMENT

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT	)	Docket Nos.
COMPANY	)	50-335, 50-389
	)	50-250, 50-251
(St. Lucie Plant,	)	
Units 1 & 2)	)	
	)	
(Turkey Point Plant,	)	
Units 3 & 4)	)	
_____	)	

**LICENSEE'S RESPONSE TO 10 CFR 2.206 PETITION FILED BY  
THOMAS J. SAPORITO, JR. AND NATIONAL LITIGATION CONSULTANTS**

Florida Power & Light Company (FPL), the Licensee for the St. Lucie Plant, Units 1 and 2, and the Turkey Point Plant, Units 3 and 4, hereby responds, by its counsel, in opposition to the Petition filed under 10 CFR 2.206 by Thomas J. Saporito, Jr. and National Litigation Consultants (Petitioner), dated April 23, 1997. Petitioner requests NRC enforcement action against FPL, asserting as an alleged basis that a "chilling effect" is present at FPL's nuclear sites because FPL dissuades employees from raising safety concerns directly to NRC.

In summary, the Petition contains no factual basis to support the relief requested. FPL is strongly committed to a work environment at its nuclear sites that encourages employees and contractors to raise nuclear safety concerns either to supervision, to FPL's SPEAKOUT employee concerns program, or directly to the NRC. Evidence of this strong commitment is found in the Plant Access Training (PAT) conducted for every FPL and contractor employee, conspicuous

postings at the nuclear sites of employees' rights to raise nuclear safety concerns, and the FPL SPEAKOUT program, which encourages employees to raise safety concerns outside the management chain without fear of retribution.

In contrast, Petitioner provides only allegations without factual support as the basis for the requested action. Moreover, the present Petition is nothing more than a rehash of several Petitions previously filed with NRC by the same Petitioner seeking enforcement action against FPL. All of those previous Petitions were denied.

FPL submits that Petitioner has not met the legal standards for initiation of a proceeding or enforcement action under 10 CFR 2.206. Accordingly, the present Petition should be denied.

#### SUMMARY OF PETITION

The Petition requests NRC to take enforcement action to modify, suspend, or revoke FPL's operating licenses until FPL can demonstrate that employees at FPL facilities are exposed to a work environment which encourages employees to raise safety concerns directly to NRC without first being required to identify their concerns to FPL; take enforcement action for unspecified "discriminatory practices"; conduct a "public hearing" to determine whether unspecified violations of NRC requirements have occurred; require posting of a written notice that employees are free to raise nuclear safety concerns directly to NRC; require FPL to provide copies of such notice to all employees at FPL's nuclear sites and incorporate those notices into the General Employee Training program. Petitioner argues that "NRC's impotence and failure to timely implement its mandate in protecting licensee employees and the public health" has resulted in a "chilling effect" at FPL's nuclear facilities.

### FPL RESPONSE

Petitioner has not met the NRC's legal standards for instituting a proceeding under 10 C.F.R. 2.206. NRC will initiate a proceeding or enforcement action under 10 C.F.R. 2.206 "only when substantial health and safety issues have been raised." Consolidated Edison Co. of New York (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 175 (1975); Washington Public Power Supply System (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984). Health and safety issues are those which call into question the conclusion that the nuclear facility can be operated safely. See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-729, 17 NRC 814, 828 (1983).

As demonstrated below, Petitioner has not provided any basis for the assertion that continued operation of the St. Lucie and Turkey Point units presents any public health and safety issue. The Petition is wholly devoid of any factual support for its bald assertions. Accordingly, the Petition should be denied.

### DISCUSSION

1. Petitioner requests that NRC take enforcement action against FPL until FPL can sufficiently demonstrate that employees are encouraged to freely raise safety concerns directly to NRC without first being required to identify their concerns to the licensee. Petitioner also requests that NRC require FPL to provide written notice which alerts employees that they can directly contact NRC about safety concerns without first having to identify their safety concerns to management. Finally, Petitioner requests that NRC require FPL to ensure that employees are aware of this position through the General Employee Training (GET) program. Each request should be denied. In fact, it is FPL's policy that FPL and contractor employees may contact the

NRC directly about any concern that they may have, whether or not they first provide this information to FPL management. As recognized by NRC in a May 31, 1996 inspection report, all FPL and contractor employees are informed of this policy.<sup>1</sup> The following recent examples are illustrative.

- \* As part of the FPL Plant Access Training (PAT)<sup>2</sup> program, all FPL and contractor employees are required to watch a videotape which provides the following instructions:

We encourage you to attempt to resolve your concerns through your appropriate level of supervision or through SPEAKOUT. However, feel free to take any concern you may have directly to the United States Nuclear Regulatory Commission.

Your rights and responsibilities, along with those of your employer, are listed in NRC Form 3, posted in the Nuclear Training Center, the Plant Access Training classroom, and each of the entrances to the plant and radiation controlled area. Phone numbers for regional NRC offices are listed on this form. You may contact the NRC about any issue that concerns them. [The phone number for NRC Region II is flashed on the screen during this discussion].

All FPL and contractor employees badged for access at FPL's nuclear sites must attend PAT before badging for unescorted access and thereafter on an annual basis.

- \* On September 5, 1996, the President of the FPL Nuclear Division sent a memorandum to all Nuclear Division employees stating that "any employee may contact the Nuclear Regulatory Commission (NRC) at any time." On that same date, the Nuclear Division President provided to his direct reports by memorandum copies of the 1996 NRC Policy

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<sup>1</sup>NRC Inspection Report 96-05 (Turkey Point), 96-07 (St. Lucie), May 31, 1996, at 2 ("Additionally, employees are made aware that if they do not wish to discuss their concerns with supervision they can bring their concerns directly to Speakout or to the NRC.").

<sup>2</sup>FPL's Plant Access Training is the "General Employee Training" referred to in the Petition.

Statement addressing the freedom of employees to raise safety concerns.<sup>3</sup> The memorandum directed that the Policy Statement be shared with employees "emphasizing the need to achieve and maintain a safety conscious environment." That Policy Statement explicitly states that while NRC normally expects employees to raise safety concerns directly with the licensee, "the Commission encourages employees to come to the NRC at any time they believe that the Commission should be aware of their concerns." 61 Fed. Reg. at 24340.

- \* During December 1996 and March/April 1997, a videotape was aired hourly on closed circuit television at the St. Lucie Plant promoting the Nuclear Safety SPEAKOUT program. On that tape, a SPEAKOUT investigator stated that "if you have a concern, get it addressed either through your supervisor or SPEAKOUT or the NRC, but don't ignore it."
- \* FPL Nuclear Division Policy NP-800, "Nuclear Safety SPEAKOUT Program," provides that "[e]mployees will be encouraged to share any concerns with their supervisors. Employees not wishing to discuss their concerns with supervision should bring them to the attention of the Nuclear Safety SPEAKOUT Program representatives or the NRC or both." The FPL Nuclear Division Policies are applicable to all FPL nuclear activities and current revisions of the Policies are available on a computer database.
- \* In the St. Lucie newsletter "St. Lucie on the Line," Vol. 4, No. 2, Mar. 1997, Site Vice President J.A. Stall wrote that

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<sup>3</sup>Freedom of Employees in the Nuclear Industry to Raise Concerns Without Fear of Retaliation, 61 Fed. Reg. 24336 (1996).

It is imperative that any nuclear safety concern be immediately addressed and the SPEAKOUT program is specifically designed for this purpose. Finally, if you are not satisfied with the response of either your line management or the SPEAKOUT program, you should feel free to bring you[r] concern to the attention of the NRC.

These examples demonstrate that FPL and contractor employees are free to raise nuclear safety concerns directly to the NRC.

2. Petitioner next cites his employment discrimination case before the U.S. Department of Labor<sup>4</sup> to support the requested relief. Petitioner fails to mention that the Secretary of Labor dismissed one of his complaints and remanded the remaining complaint to an Administrative Law Judge (ALJ) for a determination of whether FPL had a legitimate reason to terminate Mr. Saporito's employment at FPL. There has been no final determination of the merits of that case, which remains pending on remand before the ALJ. FPL maintains the Company had a legitimate business reason to terminate Petitioner and that his claims are wholly without merit.

3. Petitioner also asserts that FPL has engaged in a "continuing pattern and practice of discrimination against employees who engage in protected activities" and provides a string of case citations which Petitioner represents are in support of his position. Petition at 4. The suggestion that the cited cases provide a factual basis for Petitioners' assertion is highly misleading. Of the eight cases cited by Petitioner, five (Diaz-Robainas, Phipps, Dysert, Kleiman, and Young) were brought under Section 210 or 211 of the Energy Reorganization Act (ERA) against FPL. Of those five cases, three were resolved in favor of the Company, and two were resolved amicably to avoid further litigation.

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<sup>4</sup>Saporito v. FPL, Nos. 89-ERA-07, 89-ERA-17.

Of the three remaining cases cited by Petitioner, one (Pillow, 87-ERA-35) was brought against an FPL contractor. While finding that the contractor violated then Section 210 of the ERA, DOL made no such finding against FPL.<sup>5</sup> The remaining two cases cited by Petitioner have absolutely no relevance to FPL. The Collins case (91-ERA-47) was brought against Florida Power Corporation; the Fry case (96-STA-7) was brought against Atlantic Construction Fabrics, Inc. under the Surface Transportation Assistance Act. The case arose out of an incident in western Pennsylvania; the inclusion of FPL in the case caption for the Consent Order Approving Settlement was in error.<sup>6</sup>

4. Finally, the Petition is nothing more than an attempt to revisit previously filed Petitions by the same Petitioner seeking essentially the same relief requested in the present Petition.<sup>7</sup> No new information or basis has been provided in the present Petition that would warrant any enforcement action or the initiation of any proceeding. Accordingly, the present Petition should be denied.

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<sup>5</sup>NRC did take enforcement action against FPL in that case (Severity Level III violation, no civil penalty) to "provide a clear message that discrimination is not acceptable and that licensees are responsible for ensuring that their contractors do not discriminate." EA 93-199, Feb. 11, 1994. However, the Pillow case occurred in 1987, and NRC recognized in the Notice of Violation that since that time FPL "instituted many improvements in its programs to address employee concerns and to sensitize its staff and contractors to the importance of ensuring that employees feel free to raise safety concerns without fear of discrimination or other retaliatory actions."

<sup>6</sup>The settlement agreement in the Fry case is attached hereto. The erroneous addition of FPL to the case caption in the Consent Order Approving Settlement in 96-STA-7 was confirmed by Counsel for the Prosecuting Party for the Department of Labor in that case.

<sup>7</sup>See In the matter of All Licensees, DD-95-8, 41 NRC 346 (1995) (requesting NRC to inquire whether licensee procedures contain restrictions that would prevent employees from bringing safety concerns directly to NRC without following chain of command); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4; and St. Lucie Nuclear Power Plant, Units 1 and 2), DD-95-7, 41 NRC 339 (1995) (requesting, inter alia, an investigation to determine if overall work environment at FPL's nuclear sites encourages employees to freely and confidentially contact NRC without going through the normal chain of command); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), DD-90-1, 31 NRC 327 (1990) (requesting enforcement action against FPL for alleged reprisals and retaliatory measures taken against employees after employees raised safety concerns to management).

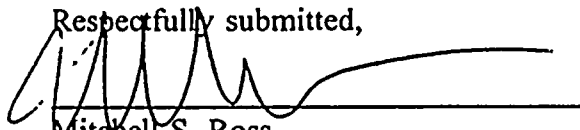
### CONCLUSION

In summary, FPL is strongly committed to maintaining a work environment where FPL and contractor employees are free to raise nuclear safety concerns directly with the NRC should they so choose. This strong commitment is further supported by the facts provided in this response. In contrast, the Petition contains only bald assertions of a so-called "chilling effect" that lack any factual basis. Accordingly, there is no reason to grant Petitioner's request for enforcement action or a "public hearing" on matters alleged in the Petition.

Based on the foregoing, the Petition should be denied.

Dated: May 27, 1997

Respectfully submitted,



Mitchell S. Ross  
Attorney, Law Department  
FLORIDA POWER & LIGHT COMPANY  
700 Universe Boulevard  
Juno Beach, FL 33408  
(561) 691-7126

Counsel for Licensee

jsap2206



**ASSISTANT SECRETARY OF LABOR FOR  
OCCUPATIONAL SAFETY AND HEALTH,  
Prosecuting Party**

**and**

**JUDGE MAHONY**

**v.**

**Respondent.**

WHEREAS, Andrew W. Fry, Robert Boring and Grady Pocorus have agreed to enter this Settlement Agreement to settle all claims alleged against Atlantic Construction Fabrics, Inc. in their complaint of December 15, 1994.

WHEREAS, Atlantic Construction Fabrics, Inc., without admitting any of the allegations of the complaint or findings of fact set forth in the Findings and Preliminary Order, has agreed to enter into this settlement agreement to settle all claims alleged against it by Andrew W. Fry, Robert Boring and Grady Pocorus in their complaint of December 15, 1994.

WHEREAS, the Assistant Secretary of Labor has conducted an investigation into the facts of this case and has concluded that a settlement between Andrew W. Fry, Robert Boring and Grady Pocorus and Atlantic Construction Fabrics, Inc., according to the terms hereinafter set forth will foster the goals of Section 405 of the STAA.

NOW, THEREFORE, it is agreed by the parties that their claims be settled and compromised on the following terms and conditions:

1. It is understood that neither the signing of this Agreement nor any actions taken in fulfillment of the representations contained herein shall constitute an admission by Atlantic Construction Fabrics, Inc. of any violation of the STAA.

2. Atlantic Construction Fabrics, Inc., in return for a complete and final settlement of all matters which were alleged by Andrew W. Fry, Robert Boring and Grady Pocorus in their complaint filed on December 15, 1994, agrees to pay the following amounts in damages:

- a. Within five (5) business days of Atlantic Construction Fabrics, Inc.'s receipt of an Order by the



administrative law judge dismissing the case with prejudice, Atlantic Construction Fabrics, Inc. shall mail to the office of Ronald J. Zera , counsel for complainants, the following checks:

i. a check in the amount of Seven Thousand Seven Hundred Seventy Seven Dollars (\$7,777.00), such check made payable to Andrew W. Fry;

ii. a check in the amount of Five Thousand Eight Hundred Thirty-Three Dollars and Thirty-Two Cents (\$5,833.32) such check made payable to Grady Pocorus;

iii. a check in the amount of Three Thousand Eight Hundred Eighty Eight Dollars and Eighty-Eight Cents (\$3,888.88), such check made payable to Robert Boring; and

iv. A check in the amount of Two Thousand Five Hundred Dollars (\$2,500.00), such check made payable to Ronald J. Zera , in full compensation for his services rendered as attorney for Complainants.

b. Complainants understand that the benefits set forth in this Paragraph, including payment of the specified fee to Mr. Zera, are all that they are entitled to receive from Atlantic Construction Fabrics, Inc. except for payments from pension or other retirement benefits to which they may be entitled to under Atlantic Construction Fabrics, Inc.'s standard retirement program. Complainants' agree that the settlement payments set forth herein are more than Atlantic Construction Fabrics, Inc. is required to pay under its normal policies and procedures.



3. Without admitting any past non-compliance with Section 405 of the STAA, Atlantic Construction Fabrics, Inc. also agrees that it will not discharge or in any manner discriminate against any of its employees due to any employee's exercise of any rights protected by the STAA.

4. Atlantic Construction Fabrics, Inc. agrees to post for sixty (60) days, in the locations where it customarily posts notices to employees, copies of the Notice attached hereto and made a part hereof. Said Notice will be signed by a responsible official of Atlantic Construction Fabrics, Inc. and will show the actual date of posting.

5. Andrew W. Fry, Robert Boring and Grady Pocorus agree that in consideration of the agreements and promises herein of Atlantic Construction Fabrics, Inc., all claims alleged and relief sought by Andrew W. Fry, Robert Boring and Grady Pocorus in their complaint of December 15, 1994 are fully satisfied.

6. Atlantic Construction Fabrics, Inc., Andrew W. Fry, Robert Boring, Grady Pocorus and the Prosecuting Party agree that the Nineteen Thousand Nine Hundred Ninety Nine dollars and Twenty cents (\$19,999.20) and Atlantic Construction Fabrics, Inc.'s other obligations and promises under this Agreement are a compromise settlement for and in consideration of resolving this case, Case No. 96-ST-7, and in consideration for the promises of Andrew W. Fry, Robert Boring and Grady Pocorus to keep the details of the settlement in the strictest confidence and not

make public the terms and conditions of this Settlement Agreement.

7. Atlantic Construction Fabrics, Inc., Andrew W. Fry, Robert Boring, Grady Pocorus and the Prosecuting Party understand, agree and intend that this Agreement constitutes complete satisfaction of any and all claims, whether known, suspected or unknown between Atlantic Construction Fabrics, Inc. and Andrew W. Fry, Robert Boring and Grady Pocorus in connection with their employment and the termination of that employment by Atlantic Construction Fabrics, Inc.

8. Atlantic Construction Fabrics, Inc., Andrew W. Fry, Robert Boring, Grady Pocorus and the Prosecuting Party agree that this Agreement is not contingent on reinstatement of Andrew W. Fry, Robert Boring, Grady Pocorus by Atlantic Construction Fabrics, Inc., and that Andrew W. Fry, Robert Boring, Grady Pocorus do not seek and will not accept reinstatement with Atlantic Construction Fabrics, Inc. Andrew W. Fry, Robert Boring, Grady Pocorus further agree that they will not apply at any time in the future for re-employment with Atlantic Construction Fabrics, Inc. or any all related companies.

9. By their signatures hereto, Atlantic Construction Fabrics, Inc., Andrew W. Fry, Robert Boring, Grady Pocorus and the Prosecuting Party specifically request that administrative law judge Robert G. Mahony dismiss with prejudice Case No. 96-STA-7.

10. Atlantic Construction Fabrics, Inc., Andrew W. Fry, Robert Boring, Grady Pocorus and the Prosecuting Party further represent that each party is entering into this Settlement Agreement knowingly and voluntarily; that each party had the opportunity to consult advisors of its own choosing, that each party understands the contents of this Agreement and its final binding effect; that this Agreement represents the full and complete terms upon which this case is settled and that no party has relied upon any statements or representations not contained in this Agreement.

11. This instrument reflects the entire Agreement by and between the parties and no statements, promises or inducements made by the parties which are not contained herein shall be valid and binding.

12. If any of the provisions of this Agreement are held to be invalid or unenforceable, all other provisions hereof shall nevertheless continue in full force and effect unless the effect of such severance would defeat the parties' intent as set forth herein.

13. Each party agrees to bear its/his own attorneys' fees, costs and other expenses incurred by such party in connection with any stages of the above-referenced proceeding including, but not limited to, attorney's fees and costs which may be available under the Equal access to Justice Act, as amended.





IN WITNESS WHEREOF, the parties hereto have caused this  
Settlement Agreement to be duly executed.

Dated: \_\_\_\_\_

  
Andrew W. Fry  
Complainant

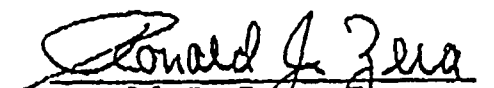
Dated: 5/23/96

RFB  
Robert Boring  
Complainant


Dated: 8/29/96

  
Grady Pocorus

Dated: 8/23/96

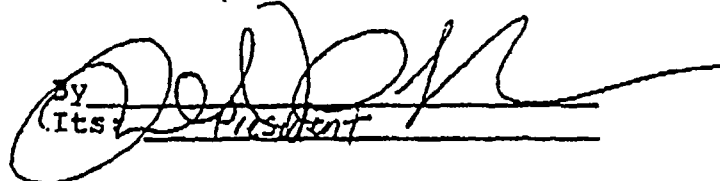
  
Ronald J. Zera, Esq.  
Counsel for Complainants

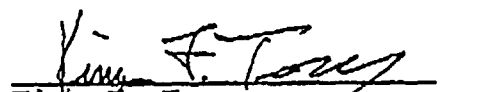
Dated: Aug 23, 1996

  
Theresa C. Timlin  
Counsel for Prosecuting Party  
U.S. Department of Labor  
3535 Market Street, Rm. 14480  
Philadelphia, PA 19104

Dated: 10/17/96

ATLANTIC CONSTRUCTION  
FABRICS, INC.

By   
(Its: President)

  
King J. Tower  
Counsel for Atlantic  
Construction Fabrics, Inc.



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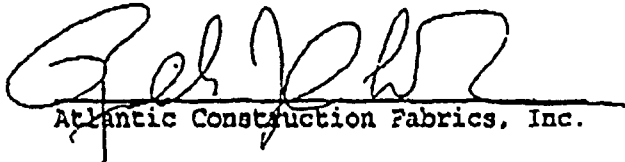
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# NOTICE TO EMPLOYEES

**PURSUANT TO A SETTLEMENT AGREEMENT  
APPROVED BY U.S. DEPARTMENT OF LABOR,  
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, THE EMPLOYER  
AGREES:**

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ATLANTIC CONSTRUCTION FABRICS, INC. agrees not to discharge, discipline, or in any manner discriminate against an employee with respect to the employee's compensation, terms, conditions, or privileges of employment for refusing to operate a vehicle when such operation constitutes a violation of any Federal rules, regulations, standards, or orders applicable to commercial motor vehicle safety or health or because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment. The unsafe conditions causing the employee's apprehension of injury must be of such nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury, or serious impairment of health, resulting from the unsafe condition. In order to qualify for protection under this subsection, the employee must have sought from his employer, and have been unable to obtain, correction of the unsafe condition.

  
Atlantic Construction Fabrics, Inc.


Dated: 10-11-96

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

**THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE OPERATIONS REVIEW OFFICER.**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the following this  
27th day of May by United States Mail, first class postage prepaid:

  
\_\_\_\_\_  
Mitchell S. Ross

James Lieberman  
Director, Office of Enforcement  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Leonard A. Wiens  
Senior Project Manager  
Project Directorate II-3  
Division of Reactor Projects-I/II  
Office of Nuclear Reactor Regulation  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Richard P. Croteau  
Project Manager  
Project Directorate II-3  
Division of Reactor Projects-I/II  
Office of Nuclear Reactor Regulation  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Frederick J. Hebdon  
Director, Project Directorate II-3  
Division of Reactor Projects  
Office of Nuclear Reactor Regulation  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Jon R. Johnson  
Director, Division of Reactor Projects  
U.S. Nuclear Regulatory Commission  
Region II  
Atlanta Federal Center  
61 Forsyth Street, SW  
Suite 23T85  
Atlanta, GA 30303

Senior Resident Inspector  
St. Lucie Plant  
U.S. Nuclear Regulatory Commission  
7585 S. Highway A1A  
Jensen Beach, FL 34957

Senior Resident Inspector  
Turkey Point Plant  
U.S. Nuclear Regulatory Commission  
P.O. Box 1448  
Homestead, FL 33090



To: ALL NUCLEAR PERSONNEL

Date: April 2, 1998

From: T. F. Plunkett *TMP*

Subject: Freedom of Employees to Raise Safety Concerns

The purpose of this memorandum is to reemphasize the rights of all employees to express concerns related to nuclear safety or quality without fear of harassment, intimidation, or retaliation.

All Nuclear Division employees have the right to raise safety concerns without fear of retaliation. Any concerns you might have may be raised to a supervisor or manager, documented in a Condition Report, reported to Nuclear Safety SPEAKOUT, or to the NRC. Nuclear Division employees will not be retaliated against for having done so.

Any employee who discriminates against an individual for raising a safety concern will be subject to severe disciplinary action and possible termination of employment.

In a related matter, you may have read in the local media that the NRC inadvertently identified the identity of persons who had raised nuclear safety concerns directly with the NRC. Please be assured that FPL is not interested in learning the names of persons who raised concerns with the NRC. FPL's interest lies in the safe operation of its nuclear plants. If you have a safety concern, whether you bring that concern to your manager, supervisor, SPEAKOUT, or the NRC, please ensure that the concern is reported so that it can be addressed in the appropriate manner.

To reemphasize FPL's policy on freedom of employees to raise safety concerns without fear of retaliation, I am attaching a copy of the NRC Policy Statement discussing this topic. The policy is fully supported by FPL management. I hope you will take the time to read this policy in its entirety.

Also, by copy of this memorandum, my direct reports and all department heads shall discuss the policy with their managers and supervisors to reenforce implementation of the policy throughout the Nuclear Division.

ATTACHMENT

On 05/14/96

[L-S document 558560, 61 FR 24336, 533 lines]

Freedom of Employees in the Nuclear Industry To Raise Safety Concerns Without Fear of Retaliation; Policy Statement

AGENCY: Nuclear Regulatory Commission.

ACTION: Statement of policy.

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SUMMARY: The Nuclear Regulatory Commission (NRC) is issuing this policy statement to set forth its expectation that licensees and other employers subject to NRC authority will establish and maintain safety-conscious environments in which employees feel free to raise safety concerns, both to their management and to the NRC, without fear of retaliation. The responsibility for maintaining such an environment rests with each NRC licensee, as well as with contractors, subcontractors and employees in the nuclear industry. This policy statement is applicable to NRC regulated activities of all NRC licensees and their contractors and subcontractors.

DATES: May 14, 1996.

FOR FURTHER INFORMATION CONTACT: James Lieberman, Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, (301) 415-2741.

SUPPLEMENTARY INFORMATION:

Background

NRC licensees have the primary responsibility to ensure the safety of nuclear operations. Identification and communication of potential safety concerns and the freedom of employees to raise such concerns is an integral part of carrying out this responsibility.

Note 1 Throughout this Policy Statement the terms "concerns," "safety concerns" and "safety problem" refer to potential or actual issues within the Commission's jurisdiction involving operations, radiological releases, safeguards, radiation protection, and other matters relating to NRC-regulated activities.

In the past, employees have raised important issues and as a result, the public health and safety has benefited. Although the Commission recognizes that not every concern raised by employees is safety significant or, for that matter, is valid, the Commission concludes that it is important that licensees' management establish an environment in which safety issues are promptly identified and effectively resolved and in which employees feel free to raise concerns.

Although hundreds of concerns are raised and resolved daily in the nuclear industry, the Commission, on occasion, receives reports of individuals being retaliated against for raising concerns. This retaliation is unacceptable and unlawful. In addition to the hardship caused to the individual employee, the perception by fellow workers that raising concerns has resulted in retaliation can generate a chilling effect that may discourage other workers from raising concerns. A reluctance on the part of employees to raise

concerns is detrimental to nuclear safety.

As a result of questions raised about NRC's efforts to address retaliation against individuals who raise health and safety concerns, the Commission established a review team in 1993 to reassess the NRC's program for protecting allegeders against retaliation. In its report (NUREG-1499, "Reassessment of the NRC's Program for Protecting Allegers Against Retaliation," January 7, 1994) the review team made numerous recommendations, including several recommendations involving issuing a policy statement to address the need to encourage responsible licensee action with regard to fostering a quality-conscious environment in which employees are free to raise safety concerns without fear of retribution (recommendations II.A-1, II.A-2, and II.A-4). On February 8, 1995, the Commission after considering those recommendations and the bases for them published for comment a proposed policy statement, "Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation," in the Federal Register (60 FR 7592, February 8, 1995).

The proposed policy statement generated comments from private citizens and representatives of the industry concerning both the policy statement and NRC and Department of Labor (DOL) performance. The more significant comments related to the contents of the policy statement included:

1. The policy statement would discourage employees from bringing their concerns to the NRC because it provided that employees should normally provide concerns to the licensee prior to or contemporaneously with coming to the NRC.

2. The use of a holding period should be at the discretion of the employer and not be considered by the NRC in evaluating the reasonableness of the licensee's action.

3. The policy statement is not needed to establish an environment to raise concerns if NRC uses its authority to enforce existing requirements by pursuing civil and criminal sanctions against those who discriminate.

4. The description of employee concerns programs and the oversight of contractors was too prescriptive; the expectations concerning oversight of contractors were perceived as the imposition of new requirements without adherence to the Administrative Procedure Act and the NRC's Backfit Rule, 10 CFR 50.109.

5. The need for employee concerns programs (ECPs) was questioned, including whether the ECPs fostered the development of a strong safety culture.

6. The suggestion for involvement of senior management in resolving discrimination complaints was too prescriptive and that decisions on senior management involvement should be decided by licensees.

In addition, two public meetings were held with representatives of the Nuclear Energy Institute (NEI) to discuss the proposed policy statement. Summaries of these meetings along with a revised policy statement proposed by NEI were included with the comments to the policy statement filed in the Public Document Room (PDR).

This policy statement is being issued after considering the public comments and coordination with the Department of Labor. The more significant changes included:

1. The policy statement was revised to clarify that senior management is expected to take responsibility for assuring that cases of alleged discrimination are appropriately investigated and resolved as opposed to being personally involved in the resolution of these matters.

2. References to maintenance of a "quality-conscious environment" have been changed to "safety-conscious environment" to put the focus on safety.



3. The policy statement has been revised to emphasize that while alternative programs for raising concerns may be helpful for a safety-conscious environment, the establishment of alternative programs is not a requirement.

4. The policy statement continues to emphasize licensees' responsibility for their contractors. This is not a new requirement. However, the policy statement was revised to provide that enforcement decisions against licensees for discriminatory conduct of their contractors would consider such things as the relationship between the licensee and contractor, the reasonableness of the licensee's oversight of the contractor's actions and its attempts to investigate and resolve the matter.

5. To avoid the possibility suggested by some commenters that the policy statement might discourage employees from raising concerns to the NRC if the employee is concerned about retaliation by the employer, the statement that reporting concerns to the Commission "except in limited fact-specific situations" would not absolve employees of the duty to inform the employer of matters that could bear on public, including worker, health and safety has been deleted. However, the policy statement expresses the Commission's expectation that employees, when coming to the NRC, should normally have provided the concern to the employer prior to or contemporaneously with coming to the NRC.

#### Statement of Policy

The purpose of this Statement of Policy is to set forth the Nuclear Regulatory Commission's expectation that licensees and other employers subject to NRC authority will establish and maintain a safety-conscious work environment in which employees feel free to raise concerns both to their own management and the NRC without fear of retaliation. A safety-conscious work environment is critical to a licensee's ability to safely carry out licensed activities.

This policy statement and the principles set forth in it are intended to apply to licensed activities of all NRC licensees and their contractors,<sup>2</sup> although it is recognized that some of the suggestions, programs, or steps that might be taken to improve the quality of the work environment (e.g., establishment of a method to raise concerns outside the normal management structure such as an employee concerns program) may not be practical for very small licensees that have only a few employees and a very simple management structure.

Note 2 Throughout this Notice, the term "licensee" includes licensees and applicants for licenses. It also refers to holders of certificates of compliance under 10 CFR Part 76. The term "contractor" includes contractors and subcontractors of NRC licensees and applicants defined as employers by section 211(a)(2) of the Energy Reorganization Act of 1974, as amended.

The Commission believes that the most effective improvements to the environment for raising concerns will come from within a licensee's organization (or the organization of the licensee's contractor) as communicated and demonstrated by licensee and contractor management. Management should recognize the value of effective processes for problem identification and resolution, understand the negative effect produced by the perception that employee concerns are unwelcome, and appreciate the importance of ensuring that multiple channels exist for raising concerns. As the Commission noted in its 1989 Policy Statement on the Conduct of Nuclear



Power Plant Operations (54 FR 3424, January 24, 1989), management must provide the leadership that nurtures and maintains the safety environment.

In developing this policy statement, the Commission considered the need for:

(1) Licensees and their contractors to establish work environments, with effective processes for problem identification and resolution, where employees feel free to raise concerns, both to their management and to the NRC, without fear of retaliation;

(2) Improving contractors' awareness of their responsibilities in this area;

(3) Senior management of licensees and contractors to take the responsibility for assuring that cases of alleged discrimination are appropriately investigated and resolved; and

(4) Employees in the regulated industry to recognize their responsibility to raise safety concerns to licensees and their right to raise concerns to the NRC.

This policy statement is directed to all employers, including licensees and their contractors, subject to NRC authority; and their employees. It is intended to reinforce the principle to all licensees and other employers subject to NRC authority that an act of retaliation or discrimination against an employee for raising a potential safety concern is not only unlawful but may adversely impact safety. The Commission emphasizes that employees who raise concerns serve an important role in addressing potential safety issues. Thus, the NRC cannot and will not tolerate retaliation against employees who attempt to carry out their responsibility to identify potential safety issues.<sup>3</sup>

Note 3 An employee who believes he or she has been discriminated against for raising concerns may file a complaint with the Department of Labor if the employee seeks a personal remedy for the discrimination. The person may also file an allegation of discrimination with the NRC. The NRC will focus on licensee actions and does not obtain personal remedies for the individual. Instructions for filing complaints with the DOL and submitting allegations can be found on NRC Form 3 which licensees are required to post.

Under the Atomic Energy Act of 1954, as amended, the NRC has the authority to investigate allegations that employees of licensees or their contractors have been discriminated against for raising concerns and to take enforcement action if discrimination is substantiated. The Commission has promulgated regulations to prohibit discrimination (see, e.g., 10 CFR 30.7 and 50.7). Under Section 211 of the Energy Reorganization Act of 1974, as amended, the Department of Labor also has the authority to investigate complaints of discrimination and to provide a personal remedy to the employee when discrimination is found to have occurred.

The NRC may initiate an investigation even though the matter is also being pursued within the DOL process. However, the NRC's determination of whether to do so is a function of the priority of the case which is based on its potential merits and its significance relative to other ongoing NRC investigations.<sup>4</sup>

Note 4 The NRC and DOL have entered into a Memorandum of Understanding to facilitate cooperation between the agencies. (47 FR 54585; December 3, 1982).

#### Effective Processes for Problem Identification and Resolution

Licensees bear the primary responsibility for the safe use of nuclear



materials in their various licensed activities. To carry out that responsibility, licensees need to receive prompt notification of concerns as effective problem identification and resolution processes are essential to ensuring safety. Thus, the Commission expects that each licensee will establish a safety-conscious environment where employees are encouraged to raise concerns and where such concerns are promptly reviewed, given the proper priority based on their potential safety significance, and appropriately resolved with timely feedback to employees.

A safety-conscious environment is reinforced by a management attitude that promotes employee confidence in raising and resolving concerns. Other attributes of a work place with this type of an environment may include well-developed systems or approaches for prioritizing problems and directing resources accordingly; effective communications among various departments or elements of the licensee's organization for openly sharing information and analyzing the root causes of identified problems; and employees and managers with an open and questioning attitude, a focus on safety, and a positive orientation toward admitting and correcting personnel errors.

Initial and periodic training (including contractor training) for both employees and supervisors may also be an important factor in achieving a work environment in which employees feel free to raise concerns. In addition to communicating management expectations, training can clarify for both supervisors and employees options for problem identification. This would include use of licensee's internal processes as well as providing concerns directly to the NRC.5 Training of supervisors may also minimize the potential perception that efforts to reduce operating and maintenance costs may cause supervisors to be less receptive to employee concerns if identification and resolution of concerns involve significant costs or schedule delays.

Note 5 Training of supervisors in the value of raising concerns and the use of alternative internal processes may minimize the conflict that can be created when supervisors, especially first line supervisors, perceive employees as "problem employees" if the employees, in raising concerns, bypass the "chain of command."

Incentive programs may provide a highly visible method for demonstrating management's commitment to safety, by rewarding ideas not based solely on their cost savings but also on their contribution to safety. Credible self assessments of the environment for raising concerns can contribute to program effectiveness by evaluating the adequacy and timeliness of problem resolution. Self-assessments can also be used to determine whether employees believe their concerns have been adequately addressed and whether employees feel free to raise concerns. When problems are identified through self-assessment, prompt corrective action should be taken.

Licensees and their contractors should clearly identify the processes that employees may use to raise concerns and employees should be encouraged to use them. The NRC appreciates the value of employees using normal processes (e.g., raising issues to the employee supervisors or managers or filing deficiency reports) for problem identification and resolution. However, it is important to recognize that the fact that some employees do not desire to use the normal line management processes does not mean that these employees do not have legitimate concerns that should be captured by the licensee's resolution processes. Nor does it mean that the normal processes are not effective. Even in a generally good environment, some employees may not always be comfortable in raising concerns through the normal channels. From a safety perspective, no method of raising potential safety concerns should be

discouraged. Thus, in the interest of having concerns raised, the Commission encourages each licensee to have a dual focus: (1) On achieving and maintaining an environment where employees feel free to raise their concerns directly to their supervisors and to licensee management, and (2) on ensuring that alternate means of raising and addressing concerns are accessible, credible, and effective.

NUREG-1499 may provide some helpful insights on various alternative approaches. The Commission recognizes that what works for one licensee may not be appropriate for another. Licensees have in the past used a variety of different approaches, such as:

- (1) An "open-door" policy that allows the employee to bring the concern to a higher-level manager;
- (2) A policy that permits employees to raise concerns to the licensee's quality assurance group;
- (3) An ombudsman program; or
- (4) Some form of an employee concerns program.

The success of a licensee alternative program for concerns may be influenced by how accessible the program is to employees, prioritization processes, independence, provisions to protect the identity of employees including the ability to allow for reporting issues with anonymity, and resources. However, the prime factors in the success of a given program appear to be demonstrated management support and how employees perceive the program. Therefore, timely feedback on the follow-up and resolution of concerns raised by employees may be a necessary element of these programs.

This Policy Statement should not be interpreted as a requirement that every licensee establish alternative programs for raising and addressing concerns. Licensees should determine the need for providing alternative methods for raising concerns that can serve as internal "escape valves" or "safety nets." 6 Considerations might include the number of employees, the complexity of operations, potential hazards, and the history of allegations made to the NRC or licensee. While effective alternative programs for identifying and resolving concerns may assist licensees in maintaining a safety-conscious environment, the Commission, by making the suggestion for establishing alternative programs, is not requiring licensees to have such programs. In the absence of a requirement imposed by the Commission, the establishment and framework of alternative programs are discretionary.

Note 6 In developing these programs, it is important for reactor licensees to be able to capture all potential safety concerns, not just concerns related to "safety-related" activities covered by 10 CFR Part 50, Appendix B. For example, concerns relating to environmental, safeguards, and radiation protection issues should also be captured.

### Improving Contractors' Awareness of Their Responsibilities

The Commission's long-standing policy has been and continues to be to hold its licensees responsible for compliance with NRC requirements, even if licensees use contractors for products or services related to licensed activities. Thus, licensees are responsible for having their contractors maintain an environment in which contractor employees are free to raise concerns without fear of retaliation.

Nevertheless, certain NRC requirements apply directly to contractors of licensees (see, for example, the rules on deliberate misconduct, such as 10 CFR 30.10 and 50.5 and the rules on reporting of defects and noncompliances in 10 CFR Part 21). In particular, the Commission's prohibition on

discriminating against employees for raising safety concerns applies to the contractors of its licensees, as well as to licensees (see, for example, 10 CFR 30.7 and 50.7).

Accordingly, if a licensee contractor discriminates against one of its employees in violation of applicable Commission rules, the Commission intends to consider enforcement action against both the licensee, who remains responsible for the environment maintained by its contractors, and the employer who actually discriminated against the employee. In considering whether enforcement actions should be taken against licensees for contractor actions, and the nature of such actions, the NRC intends to consider, among other things, the relationship of the contractor to the particular licensee and its licensed activities; the reasonableness of the licensee's oversight of the contractor environment for raising concerns by methods such as licensee's reviews of contractor policies for raising and resolving concerns and audits of the effectiveness of contractor efforts in carrying out these policies, including procedures and training of employees and supervisors; the licensee's involvement in or opportunity to prevent the discrimination; and the licensee's efforts in responding to the particular allegation of discrimination, including whether the licensee reviewed the contractor's investigation, conducted its own investigation, or took reasonable action to achieve a remedy for any discriminatory action and to reduce potential chilling effects.

Contractors of licensees have been involved in a number of discrimination complaints that are made by employees. In the interest of ensuring that their contractors establish safety-conscious environments, licensees should consider taking action so that:

- (1) Each contractor involved in licensed activities is aware of the applicable regulations that prohibit discrimination;
- (2) Each contractor is aware of its responsibilities in fostering an environment in which employees feel free to raise concerns related to licensed activities;
- (3) The licensee has the ability to oversee the contractor's efforts to encourage employees to raise concerns, prevent discrimination, and resolve allegations of discrimination by obtaining reports of alleged contractor discrimination and associated investigations conducted by or on behalf of its contractors; conducting its own investigations of such discrimination; and, if warranted, by directing that remedial action be undertaken; and
- (4) Contractor employees and management are informed of (a) the importance of raising safety concerns and (b) how to raise concerns through normal processes, alternative internal processes, and directly to the NRC.

Adoption of contract provisions covering the matters discussed above may provide additional assurance that contractor employees will be able to raise concerns without fear of retaliation.

#### Involvement of Senior Management in Cases of Alleged Discrimination

The Commission reminds licensees of their obligation both to ensure that personnel actions against employees, including personnel actions by contractors, who have raised concerns have a well-founded, non-discriminatory basis and to make clear to all employees that any adverse action taken against an employee was for legitimate, non-discriminatory reasons. If employees allege retaliation for engaging in protected activities, senior licensee management should be advised of the matter and assure that the appropriate level of management is involved, reviewing the particular facts

and evaluating or reconsidering the action.

The intent of this policy statement is to emphasize the importance of licensee management taking an active role to promptly resolve situations involving alleged discrimination. Because of the complex nature of labor-management relations, any externally-imposed resolution is not as desirable as one achieved internally. The Commission emphasizes that internal resolution is the licensee's responsibility, and that early resolution without government involvement is less likely to disrupt the work place and is in the best interests of both the licensee and the employee. For these reasons, the Commission's enforcement policy provides for consideration of the actions taken by licensees in addressing and resolving issues of discrimination when the Commission develops enforcement sanctions for violations involving discrimination. (59 FR 60697; November 28, 1994).

In some cases, management may find it desirable to use a holding period, that is, to maintain or restore the pay and benefits of the employee alleging retaliation, pending reconsideration or resolution of the matter or pending the outcome of an investigation by the Department of Labor (DOL). This holding period may calm feelings on-site and could be used to demonstrate management encouragement of an environment conducive to raising concerns. By this approach, management would be acknowledging that although a dispute exists as to whether discrimination occurred, in the interest of not discouraging other employees from raising concerns, the employee involved in the dispute will not lose pay and benefits while the action is being reconsidered or the dispute is being resolved. However, inclusion of the holding period approach in this policy statement is not intended to alter the existing rights of either the licensee or the employee, or be taken as a direction by, or an expectation of, the Commission, for licensees to adopt the holding period concept. For both the employee and the employer, participation in a holding period under the conditions of a specific case is entirely voluntary.

A licensee may conclude, after a full review, that an adverse action against an employee is warranted.<sup>7</sup> The Commission recognizes the need for licensees to take action when justified. Commission regulations do not render a person who engages in protected activity immune from discharge or discipline stemming from non-prohibited considerations (see, for example, 10 CFR 50.7(d)). The Commission expects licensees to make personnel decisions that are consistent with regulatory requirements and that will enhance the effectiveness and safety of the licensee's operations.

Note 7 When other employees know that the individual who was the recipient of an adverse action may have engaged in protected activities, it may be appropriate for the licensee to let the other employees know, consistent with privacy and legal considerations, that (1) management reviewed the matter and determined that its action was warranted, (2) the action was not in retaliation for engaging in protected activity and the reason why, and (3) licensee management continues to encourage them to raise issues. This may reduce any perception that retaliation occurred.

#### Responsibilities of Employers and Employees

As emphasized above, the responsibility for maintaining a safety-conscious environment rests with licensee management. However, employees in the nuclear industry also have responsibilities in this area. As a general principle, the Commission normally expects employees in the nuclear industry to raise safety and compliance concerns directly to licensees, or indirectly to licensees



through contractors, because licensees, and not the Commission, bear the primary responsibility for safe operation of nuclear facilities and safe use of nuclear materials.<sup>8</sup> The licensee, and not the NRC, is usually in the best position and has the detailed knowledge of the specific operations and the resources to deal promptly and effectively with concerns raised by employees. This is another reason why the Commission expects licensees to establish an environment in which employees feel free to raise concerns to the licensees themselves.

Note 8 The expectation that employees provide safety and compliance concerns to licensees is not applicable to concerns of possible wrongdoing by NRC employees or NRC contractors. Such concerns are subject to investigation by the NRC Office of Inspector General. Concerns related to fraud, waste or abuse in NRC operations or NRC programs including retaliation against a person for raising such issues should be reported directly to the NRC Office of the Inspector General. The Inspector General's toll-free hotline is 800-233-3497.

Employers have a variety of means to express their expectations that employees raise concerns to them, such as employment contracts, employers' policies and procedures, and certain NRC requirements. In fact, many employees in the nuclear industry have been specifically hired to fulfill NRC requirements that licensees identify deficiencies, violations and safety issues. Examples of these include many employees who conduct surveillance, quality assurance, radiation protection, and security activities. In addition to individuals who specifically perform functions to meet monitoring requirements, the Commission encourages all employees to raise concerns to licensees if they identify safety issues<sup>9</sup> so that licensees can address them before an event with safety consequences occurs.

Note 9 Except for the reporting of defects under 10 CFR Part 21 and in the area of radiological working conditions, the Commission has not codified this expectation. Licensees are required by 10 CFR 19.12 to train certain employees in their responsibility to raise issues related to radiation safety.

The Commission's expectation that employees will normally raise safety concerns to their employers does not mean that employees may not come directly to the NRC. The Commission encourages employees to come to the NRC at any time they believe that the Commission should be aware of their concerns.<sup>10</sup> But, while not required, the Commission does expect that employees normally will have raised the issue with the licensee either prior to or contemporaneously with coming to the NRC. The Commission cautions licensees that complaints that adverse action was taken against an employee for not bringing a concern to his or her employer, when the employee brought the concern to the NRC, will be closely scrutinized by the NRC to determine if enforcement action is warranted for discrimination.

Note 10 The Commission intends to protect the identity of individuals who come to the NRC to the greatest extent possible. See "Statement of Policy on Protecting the Identity of Allegers and Confidential Sources."

Retaliation against employees engaged in protected activities, whether they have raised concerns to their employers or to the NRC, will not be tolerated. If adverse action is found to have occurred because the employee raised a concern to either the NRC or the licensee, civil and criminal enforcement action may be taken against the licensee and the person responsible for the

discrimination.

#### Summary

The Commission expects that NRC licensees will establish safety-conscious environments in which employees of licensees and licensee contractors are free, and feel free, to raise concerns to their management and to the NRC without fear of retaliation.

Licensees must ensure that employment actions against employees who have raised concerns have a well-founded, non-discriminatory basis. When -allegations of discrimination arise in licensee, contractor, or subcontractor organizations, the Commission expects that senior licensee management will assure that the appropriate level of management is involved to review the particular facts, evaluate or reconsider the action, and, where warranted, remedy the matter.

Employees also have a role in contributing to a safety-conscious environment. Although employees are free to come to the NRC at any time, the Commission expects that employees will normally raise concerns with the involved licensee because the licensee has the primary responsibility for safety and is normally in the best position to promptly and effectively address the matter. The NRC should normally be viewed as a safety valve and not as a substitute forum for raising safety concerns.

This policy statement has been issued to highlight licensees' existing obligation to maintain an environment in which employees are free to raise concerns without retaliation. The expectations and suggestions contained in this policy statement do not establish new requirements. However, if a licensee has not established a safety-conscious environment, as evidenced by retaliation against an individual for engaging in a protected activity, whether the activity involves providing information to the licensee or the NRC, appropriate enforcement action may be taken against the licensee, its contractors, and the involved individual supervisors, for violations of NRC requirements.

The Commission recognizes that the actions discussed in this policy statement will not necessarily insulate an employee from retaliation, nor will they remove all personal cost should the employee seek a personal remedy. However, these measures, if adopted by licensees, should improve the environment for raising concerns.

Dated at Rockville, Maryland, this 8th day of May, 1996.

For the Nuclear Regulatory Commission.

John C. Hoyle,

Secretary of the Commission.

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