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Mr. Michael T. Lesar
Chief, Rules and Directives Branch
Division of Administrative Services
Office of Administration
Mail Stop T-6D59
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Re: Request for Comment on the Use of Alternative Dispute Resolution in Discrimination Enforcement; 67 *Federal Register* 54,237 (August 21, 2002)

Dear Mr. Lesar:

Winston & Strawn is pleased to have the opportunity to comment on the potential use of Alternative Dispute Resolution (ADR) in connection with potential NRC enforcement. These comments are submitted in response to the above-referenced *Federal Register* notice. According to the notice, the NRC Staff is considering a pilot program for the use of ADR in cases of potential discrimination and/or wrongdoing enforcement actions. The comments are filed with the support and input of numerous clients of the firm that the firm has represented in discrimination and enforcement proceedings.

Winston & Strawn supports both the use of ADR in discrimination enforcement proceedings and the development of an ADR pilot program, for the reasons detailed below. These comments focus on the use of ADR in discrimination cases, although ADR may be useful in cases involving other types of wrongdoing.

Although we support the use of ADR and appreciate the agency's consideration of measures to improve the discrimination enforcement process, we add that implementation of an ADR program should not be viewed as a solution to the numerous issues that have arisen in recent years concerning the NRC's current process for handling discrimination allegations. For example, to the extent the agency and employers remain at loggerheads over the legal standards used by the NRC, a matter on which we have commented previously, disputes between licensees and the agency may remain polarized and difficult to resolve even with the prospect of ADR. Fundamental changes to the processes for handling discrimination allegations deserve concurrent focus with ADR program development.

E-RIDS = ADM-03
Add = B. Westreich (BCW)

Template = ADM-013

We note that a recent SECY memo to the Commissioners advocates broad changes to the NRC's process for handling discrimination claims. In particular, the recommendation to the Commission is for a "fundamental realignment of the way the Agency handles discrimination complaints" by realigning the programmatic responsibilities for employee protection to licensees, rather than trying to drive cultural improvements through the enforcement and resolution of individual cases. SECY-02-0166 (Sept. 12, 2002). That recommended process would eliminate most if not all NRC investigations of individual discrimination claims, bringing the NRC in line with the practices of other federal agencies. If implemented, the proposal seemingly would largely eclipse the need for ADR in the enforcement context. (ADR could continue to be used, as it can be used now, in resolution of the private dispute between the licensee and employee.) To the extent the NRC would remain involved in some set of residual discrimination investigations, particularly during any transition period toward potential implementation of the SECY memo recommendations, ADR may provide a useful tool.

Thank you for your consideration of our comments. Please contact us if you should have any questions.

Respectfully submitted,

Donn C. Meindertsma

Encl.

Comments of

WINSTON & STRAWN

on the

Use of Alternative Dispute Resolution in NRC Discrimination Enforcement

October 21, 2002

The NRC has requested comments regarding the use of Alternative Dispute Resolution (ADR) in certain enforcement disputes. 67 *Federal Register* 54,237 (August 21, 2002). In particular, the NRC has requested comments to take into consideration in proposing a pilot program for the use of ADR in enforcement cases involving allegations of discrimination and/or wrongdoing.

Winston & Strawn appreciates the opportunity to submit these comments on behalf of licensees represented by the firm. As a summary of our comments, Winston & Strawn supports the use of ADR in discrimination enforcement cases. Among other things, an ADR option promises potential improvements in the timeliness of discrimination claim resolution, and the presence of a neutral early in the process may help minimize the polarization between parties that is often characteristic of discrimination claims. We also believe that ADR would in no respect weaken the ability of the NRC to achieve its ultimate interest in the discrimination context: enhancement of licensee safety conscious work environment efforts.

Implementation of ADR should not, however, lead to additional burdens upon licensees in discrimination cases. In particular:

- The NRC should not become involved in or require ADR sessions between the licensee and an employee in a case that would not otherwise meet NRC thresholds for investigation or other NRC involvement.

- An NRC ADR program should not impose a requirement that the licensee engage in dispute resolution efforts with the employee-alleger, nor any formal step for licensee-employee negotiations; whether ADR is the proper vehicle to resolve the private dispute should be at the licensee's option.

- ADR should not have the effect of adding another step to, and thus of imposing another resource burden on, already extensive and lengthy NRC discrimination investigation and enforcement proceedings.

- An ADR program should not impair the ability of licensees and the NRC Staff to privately resolve discrimination allegations and potential enforcement through voluntary settlement negotiations, which would not involve ADR or a neutral.

We support the use of a pilot program for implementing ADR in discrimination enforcement. A pilot program would provide an opportunity to assess the success of ADR in resolving disputes and the potential downsides of ADR use.

Below, we address the potential benefits of ADR in the context of discrimination enforcement; express cautions that the NRC should take into account in designing a pilot program; and recommend parameters for an ADR program.

I. The Potential Benefits of ADR in Discrimination Enforcement

We support the availability of ADR in connection with discrimination enforcement matters for many of the same reasons identified in the *Federal Register* notice and in NEI's comments. ADR may diffuse emotional discrimination claims through the early intervention of a neutral and may result in prompt resolution of some discrimination claims, thus easing the burden and cost imposed by disruptive and lengthy investigation and enforcement processes. Moreover, by introducing a neutral, ADR may ensure full and fair consideration of licensee legitimate business interests in the context of a discrimination claim. We see no reason why ADR, successful many times in other employment discrimination contexts, cannot be successful at times for resolving discrimination allegations that happen to be lodged with the NRC.

We disagree with the concern raised by a citizen group representative, as summarized in the *Federal Register* notice, that ADR could "weaken" the enforcement process. Our disagreement is based on our view that the NRC's focus in the discrimination arena should be to encourage licensees to reflect upon and implement measures that may enhance the safety conscious work environment and minimize the risk of future, similar discrimination claims. The recent Senior Management Review Team analysis of the proper role of the NRC in the discrimination context agrees that driving cultural enhancements through isolated discrimination enforcement actions is not a desirable approach. The NRC should shift its focus to proactive and non-prescriptive enhancement of the work environment. *See* SECY-02-0166 (Sept. 12, 2002). With this proper focus in mind, nothing about ADR would weaken the NRC's objectives because the NRC in ADR sessions could pursue corrective actions by the licensee that foster safety conscious work environments. True, a successful ADR effort in a given case would likely leave the parties without a final answer by the NRC as to whether a particular personnel decision constituted, in the agency's estimation, discrimination. Yet, neither the NRC's role in this arena, nor the protection of public safety and health, would be weakened by the lack of a discrimination determination because the NRC could still pursue its ultimate interest in addressing the licensee's work culture.[1]

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[1] Although it did not involve an intermediary or ADR, the recent resolution of a discrimination claim against Exelon through a Confirmatory Order illustrates how the NRC can achieve its central objective to encourage the enhancement of safety conscious work environments. The licensee's prompt admission of a Section 50 7 violation allowed the NRC and the licensee to focus on their mutual interest to consider programmatic actions to minimize the risk of similar violations in the future and enhance sensitivity to employee protection regulations. *Exelon Generation Co , LLC*, EA-02-124 (Confirmatory Order Modifying Licenses, Oct. 3, 2002).

Moreover, successful resolution of a dispute through ADR would not have any chilling effect on the work environment. Instead, successful conciliation most likely would leave the impression that the objectives of both parties have been accomplished. An enforcement action, in contrast, may have unintended and counterproductive chilling impacts.

In addition to not weakening the NRC's role, ADR may help address some specific concerns about the process used in the current discrimination enforcement scheme.[2] Many stakeholders have criticized the lack of transparency in the process, the improper importation of criminal investigation techniques in second-guessing human resources decisions, the polarization of the parties that necessarily results from the NRC's approach, and duplication of the efforts of other agencies. To the extent dispute resolution can diminish the need for NRC investigations, these problems with the process will become less prominent.

II. Cautions About the Use of ADR in Discrimination Enforcement

While we support the use of ADR in discrimination enforcement, we offer the following cautions.

A. The Promise of ADR Will Not Be Fully Realized Without Concurrent Changes to the NRC Staff's Substantive Approach to Discrimination Allegations.

In some respects, as just discussed, the use of ADR in discrimination enforcement may alleviate certain concerns about the NRC's process for pursuing potential Section 50.7 violations. In other respects, standards the NRC currently applies in Section 50.7 cases to determine whether a discrimination violation occurred lead to polarization in the discrimination enforcement process. This polarization may impede ADR efforts to find common ground for resolution. While as noted above we believe the focus in discrimination enforcement, as well as in ADR efforts in discrimination cases, should focus on work environment issues, rather than a narrow "did Sally shoot John" inquiry, we expect that for the near future, the question whether discrimination occurred will be a primary topic in ADR sessions.

Chief among concerns about the NRC's discrimination standards is that the NRC Staff discounts an employer's legitimate business reasons for an employment action once the Staff concludes that some inference can be drawn that an employee's protected activity "in part" contributed to an employment decision. The "in part" test, as applied by the Staff, results in cited violations even in circumstances where the action taken by the employer was the most responsible course. *See* NRC Discrimination Task Group Report, "Policy Options and Recommendations for Revising the NRC's Process for Handling Discrimination Issues" (April 2002), p. 25: "Since the NRC is not seeking relief for a wronged employee, but rather a penalty for violation of its regulation, *whether a licensee can prove that it would have taken the same action for legitimate reasons alone is not relevant*" (emphasis added).

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[2] These issues are discussed in the recently released Final Report of the NRC Discrimination Task Group, "Policy Options and Recommendations for Revising the NRC's Process for Handling Discrimination Issues" (April 2002).

Although an ADR option might bring about the opportunity to openly discuss application of substantive enforcement standards to a particular fact pattern, we are concerned that ADR attempts may prove futile in the types of disputes the NRC currently is active in investigating under Section 50.7. This concern may become more pronounced the later in a particular case that ADR efforts are initiated, because in the later stages the parties may have more closely focused on, and staked out positions on, whether discrimination occurred (rather than on work environment issues). Consider the following hypothetical case, submitted to ADR:

> A department director at a plant recommends to his vice president that a subordinate department manager be demoted. The director lays out a compelling case, citing the manager's borderline management skills and controversial style. These performance problems have resulted in potential non-compliance issues and deflated department morale. When pressed by the vice president, the director concedes that he did, in fact, consider as part of the manager's "style" the abrasive manner in which the manager recently pursued a nuclear safety concern. The manager's concern was valid, and while the way in which he pursued it was not egregious in any sense, the director is of the persuasion that the manager could have handled the matter more effectively. Weighing the pros and cons, the vice president approves the demotion recommendation.

The current "in part" test would result in an enforcement finding that the demotion violated Section 50.7. The legitimate reasons offered to the vice president and considered by him, and which tipped the scales toward demotion, are "not relevant" to the NRC, because the recommendation was tainted by consideration of protected activity. In fact, the only apparent way the vice president could avoid a Section 50.7 violation in the hypothetical would be to reject the recommendation and keep an under-performing manager in his position at a nuclear power plant.

Would ADR be useful in such a case? The NRC and the licensee would approach the case from diametrically opposed perspectives. Since the regulatory approach today dictates that "purity in management motive" must trump all other management values that might be brought to bear in a personnel decision, the NRC would see a clear violation. The licensee would take the position that it unquestionably followed the right course of action and that, moreover, this prudent decision of a company vice president should be vigorously defended. In short, management's position that it "ultimately did the right thing" would clash with the NRC Staff's stance that "doing the right thing ultimately does not matter" once motive is tainted. While a neutral might assist the parties in reaching a resolution, the neutral's job will be all the harder given the polarization in positions and interests that the NRC's current enforcement standards induce.

In short, while we support a pilot program that permits the use of ADR in discrimination enforcement cases, the benefits of ADR will be fully realized only if underlying substantive

issues with the agency's implementation of Section 50.7 are addressed concurrently with implementation of the program.

B. An ADR Program Should Not Add New Expectations on Licensees to Resolve Private Disputes.

NRC Section 50.7 investigations and enforcement proceedings grow out of an allegation by an employee (or sometimes more than one employee) that he has been discriminated against for raising a safety issue. Although the premise of these cases is an employer-employee dispute, the NRC's enforcement process involves only a regulator-licensee (or regulator-contractor) matter. The NRC has consistently expressed, and consistently informs discrimination allegers, that the NRC does not pursue the employee's interests or remedies for the employee.

An ADR component to the discrimination enforcement process should permit that distinction to be preserved. Both an employee who makes a claim of discrimination and the accused employer can opt to pursue any number of paths to address the claim. At one end of the spectrum, the parties can refuse to discuss amicable resolution and proceed to potential litigation. At the other end, the parties can talk the matter out and may be able to resolve it with a handshake. NRC involvement has not been expected or required in these private forms of resolution.

An NRC ADR program should not preclude efforts by the licensee and the employee to resolve the private dispute. Practically speaking, an NRC program could not do so because, as just noted, employers and employees have options outside the NRC's regulatory scope for resolving claims. We also see no need for an ADR program to formalize steps that endorse the involvement of the employee. Whether the employee is involved in the NRC ADR efforts ordinarily should be at the licensee's option, because the licensee may rather choose to deal directly with the employee outside the NRC regulatory process. Resolution of the private aspect of the dispute between the employee and the licensee through an NRC ADR program also would likely not be appropriate in later stages of a discrimination case, when the employee has chosen to pursue his or her claim through the Department of Labor, or when the employee and the licensee have already reached a resolution of the employee's discrimination claim.

In addition, a pilot ADR program should not impose any expectation that a licensee should engage in settlement discussions or ADR efforts with an employee-alleger simply because the discrimination allegation is of low significance. If a discrimination claim would not otherwise be referred for investigation and potential enforcement under applicable NRC thresholds, that should be the end of the NRC's involvement.

Finally, we believe that the focus and goals of the NRC ADR efforts should be carefully limited to matters between the NRC and the licensee. If the alleger is permitted a significant role or stake in the dispute resolution, the ADR effort is highly likely to become sidetracked toward an issue that is not part of the NRC enforcement process: a remedy for the alleger. As noted above, the licensee and employee are free to contest the appropriateness of remedies through

litigation or may seek to amicably resolve the matter by private resolution efforts or Department of Labor mediation. The focus for the NRC should be on the work environment, corrective actions related to the work environment, and the need for enforcement.

In short, if the discrimination allegation would not otherwise be pursued by the NRC, *e.g.*, for lack of a prima facie case, the NRC should not breathe life into a regulatory component to the dispute by purporting to oversee resolution efforts between the employee and licensee. Nor should the ADR process serve as a new avenue for employees to seek personal remedies through resolution that would not be awardable if the enforcement process ran to completion.

C. An ADR Program Should Attempt to Avoid Adding Another Step to the Enforcement Process.

While ADR brings the potential for benefits, it also brings the potential to add "another step" in the enforcement process. If ADR cannot be implemented in a way that provides a high probability of resolving the types of cases that lead to enforcement actions, ADR will become a burden, not an enhancement, or simply will not be used.

As currently implemented, the NRC's discrimination enforcement process results in lengthy phases of investigation, enforcement consideration, and enforcement implementation. The process is burdensome on all those involved in the discrimination allegation, including, typically, the employee-alleger, the accused perpetrator, other managers, the Employee Concerns Program, and licensee legal and Human Resources staff. Arguably, the burden and expense of the process have a more significant impact upon the licensee than does an ultimate finding of discrimination.

Accordingly, the pilot program should strive to assure that resort to ADR does not require delay in the process. For this reason, ADR should be implemented as early after the dispute has arisen as possible. We also suggest that ADR procedures remain informal; they should not, for example, involve formal proceedings before a "public council" that might require unwarranted preparation time and expense.

Another way to ease the enforcement burden would be to ensure that binding forms of dispute resolution, such as binding arbitration, remain as options. While entering into a binding resolution process would be voluntary, assurance by the licensee that the enforcement dispute will end with the ADR effort may be an attractive incentive to ADR because it will eliminate the burdens of the enforcement process discussed above. Licensees are unlikely to desire both an ADR session with the NRC and, later, a predecisional enforcement conference with the Staff. Of course, the NRC's ADR program must be structured to ensure that the agency will be bound by the results of a binding resolution effort, absent abuse of discretion or clear violation of public policy.

D. An ADR Element to the Enforcement Process Should Not Dissuade Voluntary Settlement Negotiations Between the Licensee and the NRC.

The current enforcement process does not preclude voluntary efforts by licensees to enter into negotiations with the NRC Staff to resolve discrimination allegations or findings. The NRC recently issued a Confirmatory Order to a licensee demonstrating that, in proper cases, licensee commitments to address broad environmental issues may achieve shared NRC and licensee objectives to minimize the risk of future discrimination claims, and so may provide a resolution path other than traditional enforcement.

An ADR program should not funnel into an ADR process all cases in which amicable resolution of the NRC regulatory issues is a possibility. The NRC should continue to entertain suggestions by licensees (and vice versa) for voluntary resolution of discrimination disputes outside the enforcement paradigm or an ADR program.

The NRC should also consider whether the existing allegation referral process could be used in conjunction with a voluntary settlement process to achieve prompt resolution of discrimination claims and implementation of any appropriate corrective actions. The NRC's allegation referral process has proven in many instances to lead to prompt licensee investigations of issues and prompt corrective actions. We see no reason why this process could not be employed, at the Regional level, for discrimination allegations. The Region could refer discrimination claims to the licensee and use the licensee's report and recommended corrective actions (if any) as the point of departure for settlement discussions of any potential discrimination violation. To the extent the NRC deems the corrective actions insufficient to address the problems identified, discussion with the licensee at the appropriate regional and licensee management level should ensue. This process, were it formalized as part of the ADR process or elsewhere, could be useful in minimizing the number of OI investigations performed, thereby conserving NRC resources. Such a process also would likely permit licensees to take less defensive, more constructive approaches to discrimination claims.

III. ADR Program Components

The following responds to issues raised by the Staff in its ongoing evaluation of a potential ADR program:

A. Timing of ADR Use

The *Federal Register* notice indicates that the Staff is evaluating the various points in the process when ADR might be appropriate. We agree with other commenters that any NRC ADR program should be flexible. We see no reason why the availability of ADR should be limited to any given stage of a discrimination case, just as there is no reason why the licensee and the NRC should be restricted from discussing amicable settlement of a discrimination claim at any given stage. We advise that the pilot program permit use of ADR at any stage.

As noted above, ADR should be available as early as possible in the process. The fact that ADR is pursued prior to a full investigation by the NRC into a discrimination claim may in many cases not be a barrier: if the focus is on corrective actions and enhancements, neither a finding of whether discrimination occurred in a particular case nor an investigation that strives to produce that finding will be highly relevant. As advocated above, we do not believe NRC policy and objectives in this area must be driven by individual discrimination findings.

B. Pool of Neutrals

We believe that a broad pool of neutrals could be used for ADR in the discrimination context, including mediators from private dispute resolution firms, retired judges and magistrates, and the like. Preferably, neutrals would have substantial experience with employment discrimination cases, include serving as neutrals in resolution of discrimination claims. To assure the appearance of impartiality and full neutrality, we do not advocate that the neutrals include persons affiliated with the NRC itself.

C. Ground Rules

The Staff invites comments on who should attend potential ADR sessions. The participants should include licensee management and NRC representatives with authority to resolve allegations of Section 50.7 violations, such as authority to agree to corrective actions, and their legal representatives. As a general rule, we do not believe that the employee-alleger should be included as a participant unless (consistent with our comments above) the licensee has opted to attempt to resolve both the regulatory issues and the private dispute through a unified, or three-way (NRC, licensee, employee) ADR effort under the NRC's program.

Other ground rules include confidentiality and agreement by all participants not to use statements during, or information prepared for, ADR sessions in any future proceedings. Current NRC enforcement in the discrimination context results in the agency's public release of outcomes, such as whether there was discrimination or not. Under an ADR program, publicity similarly should focus on the outcome of a mediated case, including information on actions to be taken by the licensee.

D. A Scenario

As an aid to envisioning an ADR element to the discrimination enforcement process, consider the following hypothetical:

> An electrician reports concerns about the adequacy of radiation protection measures for work performed during an outage in the reactor building. The electrician subsequently is not selected for a supervisory position in his department. He contacts the NRC and expresses his belief that his safety concern caused his non-selection. The NRC advises the

> electrician of the right to pursue a claim before the Department of Labor, and the electrician files a complaint there.

How might ADR work in this scenario? Pursuant to our comments, if the allegation does not meet threshold requirements for NRC investigation (*e.g.*, there is no prima facie case of discrimination because it is evident that the selection decisionmaker did not know of the electrician's concern), no NRC involvement is warranted. The NRC should not attempt to drive resolution of this dispute between the parties through an NRC ADR program. Instead, the matter should be left to the private parties to resolve or litigate.

If the claim does meet NRC investigation thresholds, the appropriate NRC Region may refer the allegation to the licensee for an internal investigation. The NRC may also opt to interview the electrician and gather details on the basis for his claims. The licensee would presumably then use internal resources or an independent party (at its option) to investigate the claim. Based on the information obtained from the licensee and the employee-alleger, the NRC should determine if further pursuit of the matter is appropriate. The initial step thereafter should be discourse between the Region and licensee management on the findings, potential need for enforcement, and potential appropriate restorative actions. If these discussions are not fruitful in resolving the matter, the parties should then have the option to enter into an ADR phase. The mediation should focus on the facts that led to the electrician's perception and the perception of others in the workplace that he was discriminated against, and the resolution should focus on measures that might prevent such perceptions from occurring in the future. As an example, if the electrician perceives he was discriminated against because the selection decisionmaker had exhibited a pattern of disinterest in safety issues raised in the department, resolution of the claim might include a special counseling session for the decisionmaker and continued observation of his responsiveness to employee concerns. The neutral would assist in exploring the impact of the perceived discrimination on the environment and the potential restorative actions.

IV. Conclusion

ADR may be as useful in resolving disputes in the discrimination enforcement context as it has proven to be in numerous other contexts. We support the Staff's consideration of a pilot program for ADR in discrimination cases, and we anticipate that ADR will become useful in a wide variety of other enforcement matters as well. We request that the NRC Staff give serious consideration to implementing a pilot program for ADR with the characteristics described above and carefully define the goals, scope and procedures for such a program.