

“Reinvigorating the Nuclear Regulatory Commission by Reflecting on its Mission”

**Remarks of Jeffrey S. Merrifield, Partner - Pillsbury Winthrop Shaw Pittman
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I would like to thank Steven Arndt, Craig Piercy and the American Nuclear Society for asking me to speak today. I am grateful for the opportunity.

On January 6, 1986, I began my first day of work in the United States Senate for Gordon J. Humphrey of New Hampshire, my home state, and the very first thing I worked on was issues associated with the construction of Seabrook Station Nuclear Power. Through 10 years in the Senate, nine years as an NRC Commissioner, 7 years as an NRC licensee, and for 8 years serving as the head of Pillsbury Law Firm’s nuclear practice, my entire 37-year career has been intrinsically interwoven with the Agency and its policies.

Being an NRC Commissioner was one of the best jobs I have ever had and to this day, and I embrace the motto of the Agency – “Protecting People and the Environment” – a tagline I helped craft. I believe the Agency is staffed by talented, bright, well-meaning and dedicated civil servants, and I firmly believe in the mission of the Agency and the value of its independent role. I also know and respect the senior managers and Commissioners, who I know are committed to trying to do the right thing to protect public health and safety.

With that preface, I believe the Agency has lost its way.

As an attorney, I am reminded of the old saw, “when in doubt” look at the law.

In Title I, Chapter 1, Section 1 of the Atomic Energy Act of 1954 it declares:

“Atomic Energy is capable of application for peaceful as well as military purposes. It is therefore declared to be the policy of the United States that –

- a. the development, use, and control of atomic energy shall be directed so as to make the maximum contribution to the general welfare, subject at all times to the paramount objective of making the maximum contribution to the common defense and security; and
- b. the development, use, and control of atomic energy shall be directed so as to promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise.”

While those words were passed into law in 1954, almost 70 years later they ring true today and remain the law of the land. At a time when global climate change is a real and present threat to our common defense and security and given that nuclear energy is the only non-carbon, proven, energy system that can reliably deliver 24x7 energy, enabling its safe usage is an obligation of the NRC under the Atomic Energy Act and Energy Reorganization Act.

In my opinion, the NRC of 2023 fails to fully recognize the positive encouragement of nuclear energy that the Atomic Energy Act put into place that frames its oversight activities in overseeing the safe use of nuclear energy in our country. Instead, it is overly conservative and does not consistently apply common sense principles in regulating the technologies it oversees. I think the current impasse on creating a new regulatory framework for Advanced Reactors under Part 53 is the most recent example of this gap. As the late Commissioner Ed McGaffigan, who I respected greatly, frequently stated, the Agency’s mission is to “provide reasonable assurance of adequate protection, not absolute protection.”

So how did this come to pass?

First, I think the Agency has a culture challenge. From where I stand, the roots of the Agency's issues go back to the late 2000's when the NRC was dubbed one of the "Best Places to Work" in the Federal Government, and even more recently when the Agency began to be referred to as the "Gold Standard of Nuclear Regulators" – a term I personally dislike. I believe these concepts fostered a trend of complacency and self-satisfaction of the type that the Agency would have found unacceptable in one of its regulated entities. While the Agency continued to claim that it too, had a self-questioning attitude and sought continual improvement, I do not believe this is consistently the case today.

I visited Palo Verde Nuclear Station toward the end of my final term on the Commission, during a time when the former INPO 1 plant had slid several tiers in the NRC's action matrix and was demonstrating repeated performance issues. As I stood in the cafeteria of the plant giving an all-hands meeting, I remarked that the plant had developed a complacent attitude and the INPO 1 flags hanging around the room no longer reflected the performance of the facility – just its past history. To his credit, Bill Post, who was the CEO of Arizona Public Service at the time, and who was watching my remarks, ordered the flags to be taken down that very afternoon.

In a similar vein, I do not think the Agency is currently performing at a "Gold Standard" level and I would recommend that such references should be avoided by the Commission and its staff.

Another contributor to this adverse cultural trend is the administration of the differing professional opinion process by the senior executives of the Commission. Having lived through the Davis Besse event, and having learned the lessons of the NASA Challenger Accident, I am well aware of the vital importance of allowing minority views to be heard and considered. We were committed to that goal when I was a Commissioner and I remain a strong proponent of that process to this day.

But, the intention of the DPO process is not to give minority views a veto to the regulatory review. DPOs should be heard, evaluated and acted upon promptly, even where the DPO does not carry the day. Ultimately, the NRC is a hierarchical organization, and senior managers must make difficult calls. Unfortunately, some NRC managers today go well out of their way to avoid DPOs, even if not justified by the regulations or the safety case. This reticence causes the regulatory process to bog down and results in the imposition of unnecessary cost and delay for the regulated licensees. In my view there needs to be much more balance in the process.

Similarly, I have heard from many licensees that the Agency staff states that it is limited in what it can say to applicants seeking clarification of Agency rules and guidance as the NRC can't act as a "consultant" due to its independent safety mission. Really?

There is absolutely nothing wrong with the Agency providing clarifications, and assistance to licensees attempting to understand and meet the complex, difficult and sometimes inscrutable guidance and rules of the NRC. Responding to questions, engaging with licensed entities with direct and fulsome responses, is the responsibility of the Agency, and it should not hide behind its role as an "independent" safety regulator.

A second area of concern is the technical prowess of the Agency, including a diversity of experience and background.

When I came to the Agency in 1998, we had a wide range of staff who had previously served in the Atomic Energy Commission, the Army and Navy Reactor Programs, the Department of Energy and its National Labs, and individuals with experience in the industry. Many of these individuals had experience in operating reactors so they brought with them a well-rounded background which helped foster the positive regulatory record that the Agency developed in the early 2000's which resulted in significant improvement in Agency and industry performance and an embrace of risk informed regulation.

There are many individuals who have worked at the NRC for the entirety of their careers and done exceptionally well, but I do believe there are too many women and men at the Agency who lack other diverse experience, resulting in a significant amount of insularity of thought and process within the agency. With the rate of retirement that has taken place at the Agency, this diversity of experience is being further eroded, and I believe the NRC now lacks the breadth and depth of technical expertise that was present when I was a Commissioner.

In my view, far too many of the seniormost members of the NRC leadership, particularly those in technical roles, lack experience outside the Agency, and I think this makes it very difficult for the NRC to receive the diversity of thought, experiences and innovation that is needed. I applauded when former Chairman Christine Svinicki, with support from the Commission, selected Ray Furstenu, formerly at the DOE Office of Nuclear Energy, to be the Director of the NRC Office of Research. I think that was an outstanding idea and Ray has brought new ideas and a new outlook which has helped to improve that important organization and the work it provides.

So how do we address some of these issues?

First, I think the Agency needs to receive the authority from Congress to pay higher wages to its workforce, similar to the exception made for the Securities and Exchange Commission and allow the Agency to recruit exceptional talent and pay them at more market-oriented rates of pay.

Second, the Agency needs to focus on skills diversity and widen the net of individuals who should be brought into the NRC. Individuals who served in industry, DOE, the military and elsewhere should be considered as candidates for every position within the Agency.

Third, the Agency needs to take a more robust effort to provide training, outside of the Agency, and frankly outside of the nuclear regulatory arena, to allow greater insights to create a workforce that is innovative, effective and efficient in their duties as regulators.

Finally, the Agency should consider, indeed perhaps, be required to consider at least one non-NRC and non-governmental candidate for each senior executive position within the Agency. While a lifetime of work at the NRC is not a bad thing, and indeed should be commended, it is beneficial for every organization, big or small, to have a diversity of thought and experience, and the NRC is no exception to that rule.

Another area I would touch upon, as an attorney, is the Office of General Counsel. The role of an attorney is to explain the law to their client, provide alternatives and make well-reasoned recommendations that the client is free to accept or reject. As a Commissioner, I benefited from the fact that Karen Cyr, who has an outstanding legal mind, served as the General Counsel. Karen was not afraid to disagree with my opinions, but she consistently tried to identify options for the Commission to achieve its objectives within the law, not just tell the Commission no.

There were circumstances where the Commission chose to take a legally riskier path, with the potential that we might not prevail in court, but we did so because it was the right thing to do. But that was the decision of the Commission. The Office of General Counsel is an advisor, not a gatekeeper. Their recommendations should be based on meeting the Agency's mission, consistent with the Atomic Energy Act, and not be unduly retarded by a fear that the Agency's longstanding track record for prevailing in court could be threatened. That is the same relationship OGC should have with the other parts of the NRC staff, and the Commission, not OGC, should be the final arbiter of how the Agency should proceed in its mission and policies.

Marian Zabler the General Counsel of the NRC will be retiring later this year. She has been a dedicated public servant and I have known and liked her since she served as Dick Meserve's legal counsel in the early 2000's. I think her departure will provide an opportunity for the Commission to take a fresh look at OGC and the role it plays in meeting the Agency's mission. As I stated earlier, I believe outside candidates should be considered for that role of the General Counsel, including individuals who have served as attorneys in the nuclear industry.

Finally, you may ask, what are my thoughts about the Commission itself?

As a former Commissioner, I think I have a deep understanding of the roles and responsibilities of the Commission, and thus have the license and frankly, the duty, to be clear in my concerns and thoughts.

I know and respect each and every one of the members of the Commission who are serving today. To a woman and man, I believe each believes they are fulfilling the oath to the Constitution that they repeated when they were first sworn in as Commissioners. That said, I think there are a few things the Commissioners should keep in mind.

Looking back at my votes over 9 years on the Commission, I am proud to say I did not cast a single vote on a party line driven basis, nor did I consult with either the executive or legislative branch on how I should turn out on a given issue. Commissioner Ed McGaffigan, with whom I served my entire term, and who was a Massachusetts born and bred Democrat, was someone with whom I voted almost all the time. While we had our differences of opinion, and while we most certainly had different political points of view, we did not let those differences, nor our respective political friends, let us influence how we came out in our safety decisions.

Additionally, as one thinks about an independent regulator, I always remind folks that Commissioners are independent not just from the companies and individuals that the Agency regulates. The NRC was created to be independent from licensees, the White House, Congress, the public, the states, non-governmental organizations, and yes, independent of the NRC staff. The job of a Commissioner is to make tough decisions, much like that of an umpire, and while each member of the Commission should listen to a diversity of voices, at the end of the day the call that they make must be independent from ALL outside influence.

Beginning with Shirley Jackson, Dick Meserve, Nils Diaz, Pete Lyons, Greta Dicus and Dale Klein, I served with a variety of individuals, Democrats and Republicans, who brought strong technical expertise to the Commission, and others of us, like Ed and I, provided a balance of policy and technical background. Maintaining that balance is important. While I believe all the currently serving Commissioners are outstanding individuals, the Commission as a whole, today, does not possess this same level of technical diversity and balance as was the case for the Commissions on which I served.

Now, whose fault is it that we are in this position?

Well, certainly not the Commissioners themselves.

It is the fault of the Office of Presidential Personnel, which through the Obama, Trump and Biden Administrations has failed to put sufficient priority on identifying a diversity of expertise on the Commission.

Since Harry Reid was the Senate Majority Leader, successive Administrations have given a virtual veto to the Nevada delegation on who is qualified to serve as an NRC Commissioner. While I understand the continued concerns about Yucca Mountain, that matter should not be a litmus test for membership on the Commission.

Going forward, the White House and the Senate Majority and Minority Leaders who influence the membership of the Commission should focus on identifying individuals who are diverse in all ways, including technically, and who understand the Agency's mission is to enable the safe use of nuclear energy to provide for the common defense and well-being of our nation.

As I close, I don't want to leave folks with the wrong impression. I am a huge supporter of the NRC and embrace its vital mission. I am proud to be an alumnus of the Agency. I also believe the Agency needs to look at itself in the mirror, recognize that it has a role in enabling nuclear technologies to provide for our common defense and security, and ensure that it is working to become a more efficient, effective, risk-

informed, timely and technically adept regulator. I believe the Agency is capable of achieving those goals, and I fervently hope that it does.

Thank you,