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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	Docket Nos. 50-390-CivP;
	)	50-327-CivP; 50-328-CivP;
TENNESSEE VALLEY AUTHORITY	)	50-259-CivP; 50-260-CivP;
	)	50-296-CivP
	)	
(Watts Bar Nuclear Plant, Unit 1;	)	ASLBP No. 01-792-01-CivP
Sequoyah Nuclear Plant, Units 1 & 2;	)	
Browns Ferry Nuclear Plant,	)	EA 99-234
Units 1, 2, & 3)	)	

BRIEF AMICUS CURIAE OF THE NUCLEAR ENERGY INSTITUTE SUPPORTING REVERSAL OF THE ATOMIC SAFETY LICENSING BOARD'S INITIAL DECISION IN LBP-03-10

October 2, 2003

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I. INTRODUCTION

On August 28, 2003, the Nuclear Regulatory Commission (NRC or Commission) issued Memorandum and Order CLI-03-09, granting TVA's petition for review of the Atomic Safety and Licensing Board's (Licensing Board) Initial Decision, LBP-03-10, 58 NRC _____ (June 26, 2003). In a split decision, the Licensing Board upheld the NRC's February 7, 2000 Notice of Violation, EA-99-234 (NOV or EA-99-234) against the Tennessee Valley Authority (TVA) for an alleged violation of 10 C.F.R. § 50.7, but reduced the civil penalty imposed by the NRC Staff's Order of May 4, 2001, from $110,000 to $44,000.

In its Memorandum and Order, the Commission determined that NEI could participate as *amicus curiae* in this phase of the proceeding without further motion. NEI's brief addresses two aspects of the Licensing Board majority decision that have important implications for the entire nuclear energy industry.

NEI's brief first addresses the legal and evidentiary standards applied by the Licensing Board's majority. The majority decision allows the NRC to impose enforcement sanctions in cases of alleged discrimination based on no more than limited inferences of an intent to discriminate – regardless of whether actual intent is established by a preponderance of the evidence and regardless of whether there is any showing that an action actually resulted from an alleged retaliatory motive.

This simplistic approach is of great concern to nuclear licensees not only because it is at odds with the Commission's regulations, but also because it could potentially affect safe nuclear plant operations. Fear of discrimination claims and enforcement actions will frustrate licensee efforts to select the most capable candidates for jobs, to address deficient performance, and to make organizational changes to improve the effectiveness of nuclear operations. The majority approach may cause reasonable managers to shun involvement with concerned individuals to avoid *any* possible inference of perceived unfairness that would be equated to discrimination should that individual be subjected to adverse action. The dissent highlighted the potential adverse effect of the majority approach:

> *[I]n this case,* I would find sustaining the Order to create a potential for abuse of the § 211 and § 50.7 protections, for resulting possible erosion of confidence in the process by those with truly legitimate concerns, and for possible counterproductive results as well, to an extent, on the part of management attempting to improve operational and safety

> performance and best utilize the skills of personnel, as in effect argued by TVA and NEI.

Initial Decision, slip op. at 81 (Judge Young, dissenting) (emphasis in original).

Further, the dissenting judge observed:

> I wish to emphasize my agreement with my colleagues that *any allegations* of discrimination and/or retaliation on the basis of alleged protected whistle blowing activity is a significant matter warranting serious attention and respect, not to be taken lightly or otherwise disregarded, especially by anyone in a position to address it. I am, however, concerned that to find a violation in the absence of a stronger case, clearly establishing by the required preponderance of the evidence standard that such discrimination or retaliation has actually occurred, may actually diminish the level of meaningful attention and respect accorded the requirements of § 50.7 by employers and employees alike, and thereby potentially compromise safety consciousness in licensee sites.

Id. at 82-83 (emphasis in original). As a matter of both law and policy, and consistent with the dissent's views, the Commission should make clear that Section 50.7 should be applied in a manner that is consistent with the balance of interests reflected in the plain language of the regulation.

The second aspect of the majority decision discussed herein is the determination that the scope of protected activity under Section 50.7 includes simply participating in the resolution of an already identified safety issue. This view is at odds with the fundamental principle undergirding nuclear whistleblower protection, i.e., that *identification* of nuclear safety issues is important to ensure plant management is aware of all information necessary to safely operate the plant. Mere participation in a licensee directed effort to resolve an issue is not synonymous with action to advance management's awareness of the *existence* of an

issue. By improperly broadening the interpretation of "protected activity," the majority fundamentally modifies 10 C.F.R. § 50.7(a).

II. ARGUMENT

A. The Licensing Board Established and Applied an Inadequate Legal Framework

The Licensing Board majority decision addresses at the outset the "Legal Principles" it believes apply to assessing a Section 50.7 case. As described below, the approach adopted by the majority – essentially finding discrimination based on *any inference* of *any degree* of discriminatory motive – does not comport with the plain language of the regulation or relevant case law.

1. Section 50.7 Defines the Required Analytical Framework

As discussed in NEI's brief *amicus curiae* filed with the Licensing Board, Section 50.7 was adopted to implement Section 210 of the Energy Reorganization Act (ERA) and to complement the Department of Labor (DOL) program to protect those who raise nuclear safety issues. *See* 47 Fed. Reg. 30,452, 30,454, 30,456 (July 14, 1982); *see also Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), DD-85-9, 21 NRC 1759, 1764 (1985) ("The Commission's current employee protection rules, including § 50.7, are derived from § 210 of the Energy Reorganization Act . . . ."). NEI argued that, as a result, the legal standards of Section 211 of the Energy Reorganization Act (42 U.S.C. 5851; the successor to Section 210), and related DOL case law, should be controlling in an NRC enforcement case under Section 50.7. The Licensing Board majority summarily rejected that position, stating "DOL

interpretations of Section 211 are not statutorily binding upon the NRC but, as pointed out by the Staff, may be taken as guidance only." Initial Decision, slip op. at 11. Then, for the most part, the Licensing Board proceeded to take no guidance whatsoever from DOL case law, or any other employment law, and adopted its own standard purported to be derived from the Atomic Energy Act and Section 50.7. While we leave open the question as to whether Section 211 is binding upon the NRC, the Licensing Board's analysis is nonetheless insufficient based on the language of Section 50.7 itself and the burden of proof placed on the NRC Staff by 10 C.F.R. § 2.732 in an enforcement case by. In light of the plain language of these two Commission regulations, and taking no more than "guidance only" from Section 211, related case law, and other employment law under Title VII of the Civil Rights Act of 1964, it is clear that the majority has adopted a grossly inadequate standard.

Section 50.7(a) prohibits discrimination against an employee "for engaging in certain protected activities." Section 50.7(d) further clarifies that the prohibition applies only "when the adverse [employment] action occurs *because* the employee has engaged in protected activities" (emphasis added). Section 50.7(d) also provides that: "Actions taken by an employer, or others, which adversely affect an employee may be predicated upon non-discriminatory grounds . . . . An employee's engagement in protected activity does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by non-prohibited considerations." The prohibition in the regulation, and the express qualification to that prohibition, are directly at issue in this case. Together, they reflect the balance that is required between two separate interests essential to

nuclear safety – employee protection on the one hand and employer needs and prerogatives on the other. Contrary to the direct statements in Section 50.7(d), the majority approach eviscerates the causation requirement and, as a result, potentially immunizes protected employees from adverse employment decisions.

2. The Commission's Regulations Require a Showing of Causation by a Preponderance of Evidence

The Licensing Board majority first established a framework for its analysis by adopting the "four elements for review" in discrimination cases, drawn from a report prepared by the Millstone Independent Review Team (MIRT).[1] Initial Decision, slip op. at 16. Similar elements have been articulated in Section 211 and case law interpreting Title VII (*see, e.g., Bartlick v. U.S. Dep't of Labor*, 73 F.3d 100, 103 n.6 (6th Cir. 1996); *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 933-34 (11th Cir. 1995)), but only for the purpose of establishing a *prima facie* case of discrimination. These elements do not address the ultimate burden of persuasion. *See, e.g., St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) ("[T]he Title VII plaintiff at all times bears the 'ultimate burden of persuasion.'"). Even the MIRT recognized that these elements are only to be used to determine whether to *institute* enforcement action (or an enforcement proceeding), and are not sufficient to reach the ultimate conclusion whether discrimination occurred and whether an enforcement sanction should be imposed. *See* MIRT Report, at 3, 7.

Under Section 50.7(d), the NRC Staff must show that adverse action resulted *because of* protected activity. Under Section 2.732, the ultimate burden of

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[1] Millstone Independent Review Team, "Report of Review, Millstone Units 1, 2, and 3: Allegations of Discrimination in NRC Office of Investigations Case Nos. 1-96-002, 1-96-007, 1-97-007 and Associated Lessons Learned" (Mar. 12, 1999) (MIRT Report).

persuasion is on the Staff to demonstrate the violation – including causation – by a preponderance of the reliable, probative, and substantial evidence. *See Radiation Tech. Inc.*, ALAB-567, 10 NRC 533, 536 (1979). Conversely, under Section 50.7(d) an adverse action based on "legitimate reasons" or on "non-prohibited considerations" is expressly allowed. Thus, for a violation of Section 50.7 to exist, a preponderance of all of the evidence of record must be sufficient to show that the protected activity (rather than legitimate or non-prohibited considerations) caused the adverse decision. This, without relying on the precise evidentiary scheme established in Section 211 and DOL case law, is the analysis required *by NRC regulations* in a discrimination case.

Based on Section 50.7(d) and Section 2.732, to sustain a causal connection between adverse action and protected activity, the NRC Staff must first prove, by a preponderance of the evidence, that retaliatory motive existed. In employment cases under Title VII, where an employer has articulated a legitimate basis for an action, this would involve showing, by a preponderance of the evidence, either directly that a discriminatory reason "more likely" motivated the employer or indirectly that the employer's proffered explanation is not credible. *See, e.g., Tex. Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 256 (1981); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 804-805 (1973). In either event, however, ultimately more than mere inference drawn from circumstantial evidence is required to "'demonstrate'" causation. *See Dysert v. Fla. Power Corp.*, 93-ERA-21, op. at 4 (Final Dec. and Order, Aug. 7, 1995) (Sec'y Labor) *aff'd,* 105 F.3d 607 (11th Cir. 1997). While inference properly drawn from evidence that established a *prima facie*

case may be considered to be probative, and thus maintain the inference, the same evidence must be more highly scrutinized and capable of standing on its own. *See Burdine,* 450 U.S. at 255 ("the factual inquiry proceeds to a new level of specificity"); *Overall v. Tenn. Valley Auth.,* 97-ERA-53, op. at 12-13 (Final Dec. and Order, Apr. 30, 2001) (Admin. Review Bd.) (stating that the inference disappears after the *prima facie* stage if the employer has presented a non-discriminatory reason for its action, "leaving the single issue of discrimination *vel non*").

Here, TVA has articulated legitimate reasons and non-prohibited considerations for its decision to not select Mr. Fiser. TVA presented substantial evidence that the non-selection of Mr. Fiser resulted from: a legitimate reorganization; a competitive posting (consistent with TVA procedures) for a new position created as a result of the reorganization; a selection process for that new position involving three evaluators, none of whom were cited for the alleged discrimination; and use of the reorganization-related selection process to select a qualified candidate instead of Mr. Fiser. Pursuant to the NRC's regulations, this explanation should prevail absent a showing, *by a preponderance of evidence,* that the "real reason" for the adverse action was the protected activity. In employment law terms, the NRC Staff would be required to show, by a preponderance of the evidence, that TVA's articulated, legitimate reasons or non-prohibited considerations were not credible or were "pretext." *See, e.g., St. Mary's Honor Ctr.,* 509 U.S. at 507-08; *Overall,* op. at 13. The majority did not even attempt to assess, in any disciplined way, whether the totality of evidence supported a conclusion, by a

preponderance of the reliable, probative and substantial evidence, that TVA's explanation was not credible or was a "pretext" for discrimination.

Significantly, the Licensing Board majority does not distinguish between an inference of a discriminatory motive that might be sufficient for a *prima facie* showing (for example, based on an "irregularity" in the way a human resources procedure is applied) and a finding of a discriminatory motive based on the preponderance of evidence. The Licensing Board majority itself found, as TVA had contended, that in Mr. Fiser's non-selection, TVA had "seemingly significant performance-oriented reasons." Initial Decision, slip op. at 2. Without deeper analysis and greater specificity of its evidentiary basis, the Licensing Board majority appears to have over-emphasized tenuous evidence and accepted inferences in order to find retaliatory motive (or "pretext") in the face of acknowledged performance issues. The majority approach, equating inferences based on perceived irregularities to a retaliatory motive, would mandate a "dual motives" finding in virtually every case.

The dissenting judge's consideration of all of the evidence, including that related to the performance issue, led her to conclude that the NRC Staff failed to meet its "ultimate burden" with respect to causation:

> In sum, although I would agree the Staff made out a prima facie case of discrimination under § 50.7, and that some of the actions taken by TVA management against Mr. Fiser were questionable, the Staff still bears the ultimate burden of proving by a preponderance of the evidence that discrimination was a contributing factor in the adverse actions against Mr. Fiser, and this is where I find the Staff's case fails. It is certainly possible that discrimination was a contributing factor in the actions against Mr. Fiser. I find it equally possible, however, that such actions were actually based only on performance-related factors together with inappropriate as well as possible inept management practices and

> actions, personality clashes, personal dislike and hostility, and related grounds. And, no matter how inappropriately undertaken, when all reasonable inferences are drawn and the possibility of the adverse actions being based only on such grounds is equally as possible as that discrimination based on protected activity played a role in the actions, the necessary conclusion is that the burden of proving some discrimination-related contributing factor, by a preponderance of the evidence, has not been met.

Id. at 80 (Judge Young, dissenting). This analytical approach is aligned with the Commission's regulations and with the careful balance the regulations struck between employee protection and management interests. Accordingly, where the record fails to establish that protected activity is the cause of the adverse action, an alleged violation of Section 50.7 cannot be sustained.

3. The Commission's Regulations Require More Than an Automatic Finding Based on Mere Inference of "Dual Motives"

Notwithstanding Mr. Fiser's performance issues, notwithstanding the substantial record establishing the selection process that was followed, and notwithstanding the evidence that the two managers cited did not even know of protected activities nor have any involvement in decisions made, the Licensing Board majority concluded that this is a "dual motives" case and that "Mr. Fiser's engagement in protected activities played at least some role in the adverse action taken against him." Initial Decision, slip op. at 64. Despite the majority's acknowledgment that Mr. Fiser's "protected activities appear to have played a minor role in his failure to be retained" (*id.* at 67), the majority nevertheless ruled that *any inference* of a dual motive is sufficient to support a violation – thereby establishing a new legal standard for Section 50.7.

Specifically, the Licensing Board majority concluded that: "*any* instances of discrimination are condemned, no matter how minor or serious" (*id.* at 13); "the sole question at issue is whether TVA violated 10 C.F.R. § 50.7 by basing to any degree its failure to retain Mr. Fiser as an employee on his involvement in one or more protected activities" (*id.*); and "the Staff may properly interpret 10 C.F.R. § 50.7 as including any degree of discrimination for protected activities and as permitting consideration of whether an employee's engagement in protected activities in any degree contributed toward an adverse personnel action, even though not the primary *or even a substantial basis for the action*" (*id.* at 16-17) (emphasis added).[2] Pursuant to the majority's construct, the NRC Staff need only present evidence to establish an inference of a retaliatory motive for adverse actions. This construct relieves the Staff of its legal obligation to demonstrate, by a preponderance of the evidence, that such a motive existed and that such a motive actually "caused" the employment action.

The Licensing Board majority approach nullifies the causation requirement of Section 50.7(d). Having found "dual motives" based on inferences, the majority simply equates that finding of motive with an ultimate finding of discrimination (using its logic that "any degree of discrimination" is a violation). This logic skips entirely the crucial question mandated by Section 50.7(d) – *i.e.*, whether, assuming for argument sake that some measure of retaliatory motive existed, such motive in any meaningful way *caused* the adverse action to be taken. Under the

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[2] The Licensing Board majority oddly finds support for this position in Supplement VII of the NRC's Enforcement Policy. *Id.* at 13 -14. This supplement, however, does not address the standards for finding a violation of Section 50.7. Rather, it presumes a violation has been found and addresses the relative significance of the violation.

Commission's own regulations, such causation must also be shown by a preponderance of the evidence.[3]

In cases decided under Title VII, the Supreme Court has grappled with the issue of the degree of causation to be proven to sustain a finding of discrimination in a putative dual motives case. Prior to being amended in 1991 to adopt statutory standards similar to present Section 211, Title VII was directly analogous to Section 50.7 in that, without any more specificity, it simply prohibited adverse action *because of* protected status.[4] In *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), Justice Brennan, writing for a plurality of four, emphasized that the statute obligated the plaintiff "to prove that the employer relied upon sex-based considerations in coming to its decision" (*id.* at 241-42), and that the protected status (or conduct) was a "substantial" or "motivating" factor in the adverse treatment (*id.* at 249, *citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 287 (1977)). Moreover, the plurality further recognized that Title VII preserves the employer's freedom of choice, and concluded that – as part of the

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[3] The MIRT Report, relied upon by the majority for the four elements of a *prima facie* case, recognized that further analysis of causation is necessary once the employer articulates legitimate reasons or non-prohibited considerations for an employment action. The MIRT suggested, without legal discussion, that in a mixed motive case it must be shown by a preponderance of the evidence that protected activity was a "contributing factor" in the adverse action. *See* MIRT Report, at 5. The MIRT suggested that it must be shown that any retaliatory intent played a "significant part in bringing about the end result." *Id.* at 8. The MIRT itself rejected a test of nexus that would find a violation where protected activity played a role equivalent to adding "a drop of water in the ocean." *Id.*

[4] The relevant part of Title VII provides:

> It shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment *because of* such individual's race, color, religion, sex, or national origin . . . .
>
> 42 U.S.C. § 2000e-2(a)(1) (emphasis added).

causation assessment – the employer would not be *liable* if it could prove that it would have come to the same conclusion without taking into account the protected status. *See Price Waterhouse*, 490 U.S. at 242, 248-50. Justice White, concurring in the judgment, emphasized the importance of the employer's defense in a dual motives case. *See id.* at 259-60. Justice O'Connor, concurring in the judgment, also found that an employee would need to show that an unlawful motive was a "substantial factor" in the adverse action and that the employer would avoid liability if it could "demonstrate that with the illegitimate factor removed from the calculus, sufficient business reasons would have induced it to take the same employment action." *Id.* at 276-77.[5] Regardless of the divergent views on the precise standard, the causation standard recognized by the majority of the Court was clearly more rigorous than the automatic finding of liability adopted by the Licensing Board here.[6] Following the lead of the Supreme Court, the NRC must

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[5] *See also Thomas v. National Football League Players Ass'n*, 131 F.3d 198, 203 (D.C. Cir 1997). This aspect of *Price Waterhouse* is also described in *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148 (2003). The precise holding in *Desert Palace*, however, is inapposite to the present issue because it post-dates the amendments to Title VII in 1991.

[6] In *Price Waterhouse* the issue of causation was exactly the same as under Section 50.7(d) – what does "because of" mean? In addressing this, the majority of justices agreed that, regardless of whether causation is a "but for" test or a "substantial factor" test, there would be – as a result of the entire assessment of causation – no *liability* if the adverse action would have been taken without consideration of protected status. The Licensing Board majority, in its analysis, rejects TVA's and NEI's prior arguments that an employer should not be cited for a violation if it is demonstrated that the same unfavorable action would have been taken in the absence of protected activity and any retaliatory motive. The Licensing Board concluded that such an approach, based on Section 211(b)(3)(D), is not appropriate because Section 211 does not apply and because that section is relevant only to the issue of "relief" and not to the threshold issue of a violation (or liability). *See* Initial Decision, slip op. at 12. Importantly, the justices in *Price Waterhouse* (and the court in *Thomas*) did not limit their point regarding the defense to "relief," but directly referred to "liability." (The NRC, of course, has also never adopted any such distinction by rulemaking.) In his opinion in *Price Waterhouse*, Justice Kennedy also cited a relevant proposition from Dean Prosser: "'[a]n act or omission is not regarded as a cause of an event if the particular event would have occurred without it.'" *Price Waterhouse*, 490 U.S. at 282 (citation omitted).

consider whether the evidence shows any meaningful causation *and* whether the adverse action would have been taken nonetheless.[7]

It is the lack of a rigorous legal analysis that is the undoing of the majority opinion. At several steps in the analysis, the Licensing Board majority fails to articulate a standard of proof (the required preponderance of the evidence), then fails to examine the totality of the record to determine whether the relevant showing has been made. Instead, the majority equates inferences of retaliatory motive to findings, and then equates these "findings" of conflicting motives to "discrimination." To paraphrase a remark in Justice Kennedy's dissenting opinion in *Price Waterhouse,* Section 50.7 is not concerned with the mere presence of inferences of impermissible motives, but rather is directed to employment decisions *that actually result from such motives. See Price Waterhouse,* 490 U.S. at 282. The Licensing Board's combination of improperly applied legal and evidentiary standards, and less-than-thorough consideration of causation, will inevitably lead – as it apparently has in this case – to grossly unfair and counterproductive decisions.

4. The Licensing Board Approach Improperly Invites Second Guessing of Reasonable Management Processes and Decisions

Application of the proper standard for enforcement of Section 50.7 is critical to nuclear managers because public health and safety are not only dependent on the safe performance of reactors and all associated systems, but also on the high quality performance of the nuclear workforce. Managers must interact with workers on a

[7] In the present case, as an example, the majority decision did not conclude that the candidate selected for the job was not the most qualified candidate. The majority glibly states that TVA is "essentially saying that a little discrimination is permissible if it enhances the ability of managers to operate their facilities efficiently." Initial Decision, slip op. at 64. Actually, TVA

host of issues and take various actions in order to ensure excellent performance and accountability. The majority's approach puts every manager who does so at risk for a Section 50.7 violation in virtually every case where there is protected activity because subjectivity and exercising discretion are inherent in personnel decisions that may later be characterized as adverse action. The inherently subjective nature of the decisions, coupled with the unduly lax legal and evidentiary standards discussed above, effectively allow the NRC to substitute its judgment for that of licensee management and then conclude that retaliatory motive must account for any differences of opinion regarding the way the licensee handled the matter. That is precisely what occurred in this case when the majority confirmed the Staff's criticism of the makeup of the Selection Review Board and the questions it posed to Mr. Fiser. The fact that the Staff might have handled these things differently should not be the basis for a finding of discrimination.

Separating the "protected" aspects of the employee's activities from legitimate, non-protected actions upon which basis management may take action is critically important in this regard. DOL has long recognized the distinction between adverse action that constitutes a violation and legitimate performance-based action. *See, e.g., Bassett v. Niagara Mohawk Power Co.*, 86-ERA-2 (Final Dec. and Order Sept. 28, 1993) (Sec'y Labor). On this very point, the Supreme Court in *Texas Dep't of Cmty. Affairs v. Burdine* instructs that laws prohibiting discrimination are "not intended to 'diminish traditional management prerogatives.'" 450 U.S. at 249, 259 (citation omitted). Thus, the Commission

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and NEI are arguing that there is *no discrimination* if protected activity does not cause the adverse action.

should not adopt a standard which, in practice, would invite the NRC Staff to substitute its judgment for that of management. The effect of such a standard is to impede licensee management from taking the right action or making the right selection simply because someone might later infer that somewhere, at some level, there was a retaliatory motive.

B. The Licensing Board Improperly Expanded "Protected Activity" Under 10 C.F.R. § 50.7

As a predicate to determining whether Mr. Fiser suffered discrimination, the Licensing Board evaluated whether he had engaged in "protected activity." Although the majority states that the Staff relies primarily on Mr. Fiser's letters to DOL and Senator Sasser, it nonetheless found that "to the extent Mr. Fiser was actively involved in the resolution of a safety-related issue, the Board regards him as being engaged in a protected activity whether or not he formally discovered, raised, reported or documented such issue." Initial Decision, slip op. at 32.

Mr. Fiser did not participate in the resolution of safety concerns on his own initiative. Rather, TVA directed him to do so after issues had been raised by others. As the dissent correctly points out (*id.* at 74), Mr. Fiser did not adequately resolve the safety concerns and, in one case, refused to initiate a procedure. Under the majority's interpretation, since Mr. Fiser's participation is protected activity, TVA could not legally remove or reassign Mr. Fiser, despite his ineffective performance, because to do so would entail a *per se* violation.

While courts generally agree that "a narrow, hyper-technical reading" of what constitutes protected activity "will do little to effect the [ERA's] aim of protection,"

Kansas Gas & Electric v. Brock, 780 F.2d 1505, 1512 (10th Cir. 1985), such a "hyper-technical" reading is not what NEI is urging. Rather, there simply is no basis in law or policy for the potential precedent established by the majority that an employee's mere participation in the resolution of a safety related issue, without some additional action (*e.g.*, identifying a problem that is either related to the solution or some other safety concern prompted by participation in the resolution) is protected. *See* 10 C.F.R. § 50.7(a)(1)(ii-iv).

The majority's reliance on *Zinn v. Univ. of Missouri*, 93-ERA-34 (Final Dec. and Order, January 18, 1996) (Sec'y Labor), to support its expanded definition of protected activity is misplaced. Initial Decision, slip op. Dec. at 32. Nowhere in *Zinn* (a case decided under Section 211) does the Secretary of Labor state or even imply that the scope of protected activity is being or should be expanded. *Zinn* did not involve the question of whether mere participation in the resolution of an issue constitutes protected activity. In fact, *Zinn* is a typical, garden variety whistleblower case in which an error (in the course of shipping radioactive material) gave rise to an NRC investigation, which occasioned the establishment of a task force that included Dr. Zinn and another employee who later claimed discrimination. As part of their participation on the task force, these employees raised concerns related to the accuracy of the amounts of radioactivity in shipments, an issue separate from the violations being investigated by the NRC. The *Zinn* decision makes clear that both employees' actions as members of the task force went well beyond mere participation in the resolution of the already reported safety-related issue; *i.e.*, they engaged in well-established forms of protected activity –

raising, documenting and identifying safety concerns and NRC violations. Therefore, and unsurprisingly, the Secretary found that action by an employee who "testified that he raised safety concerns in a meeting" to resolve a known issue, and who raised objections about the (already known) issue during a formal meeting and afterward, constituted protected activity. *Id.*, at 10, n. 10.

In each of the instances in which the Licensing Board majority concluded that Mr. Fiser's activity was protected, the majority's own statements undercut its reasoning and demonstrate the need for a clear Commission directive. The majority's acceptance of Mr. Fiser's refusal to perform data trending in the manner recommended by the Nuclear Safety Review Board provides a particularly extreme example of the majority's improper expansion of the scope of protected activity. The majority confirms that Mr. Fiser refused to institute a procedure requiring daily data trending out of no more than a concern that failure to adhere to the procedure could subject TVA to NRC enforcement. Initial Decision, slip op. at 44-45. Yet, the majority nevertheless found such action to be protected. The majority's conclusions in this regard are based on particularly novel reasoning – that Mr. Fiser refused to develop the procedure "for what he regarded as safety-related reasons, i.e., the likely regulatory infractions that could result." *Id.* at 45. While a refusal to work based on a concern either about the safety of an activity or its legality is protected, no authority exists for the proposition that a refusal to develop and implement a procedure as assigned, based on a concern about some hypothetical regulatory infraction, is protected under either Section 211 or Section 50.7.

Even under the most expansive interpretations of protected activity, a distinguishing characteristic is the employee's questioning, reporting, refusing, complaining, discovering, participating (in a proceeding), or taking some other step to raise to an appropriate entity (NRC, licensee management, etc.) a safety related issue. The fact that the employee has taken some action or registered some safety concern – internally or otherwise – serves as the basis for protecting the employee from potential retaliation for that activity.[8] As the dissent unequivocally maintains, protection is afforded to employees under Section 50.7 because a whistleblower's actions may be perceived to be "against management's wishes," not actions undertaken at the direction of management to correct safety problems. *Id.* at 72, 74.

The majority's expansion of protected activity has far-reaching implications. Like the legal framework discussed above, this interpretation undermines licensees' long recognized right to manage and address inadequate performance. *See Danielson v. City of Lorain*; 938 F.2d 681, 683 (6th Cir. 1991) ("[p]oor work performance" is a legitimate nondiscriminatory reason for terminating an employee.); *Chaney v. New Orleans Pub. Facility Mgmt., Inc.*, 179 F.3d 164, 167-68 (5th Cir. 1999) ("The failure of a subordinate to follow the direct order of a supervisor is a legitimate nondiscriminatory reason for discharging that

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[8] Although both Sections 211 and 50.7(a) include raising an internal complaint as protected activity, Mr. Fiser's mere participation in resolving an identified issue cannot even be argued to be analogous to cases wherein a quality control inspector, in the normal course of his or her job, identified safety related issues and therefore was found to have engaged in a protected activity. *See, e.g., Mackowiak v. Univ. Nuclear Systems, Inc.*, 735 F. 2d 1159 (9th Cir. 1984). Neither does this case present a refusal to work based on an unsafe condition or directive to engage in an unlawful act. *See, e.g., Doyle v. Sec'y of Labor*, 285 F.3d 249, n. 8 (3rd Cir. 2002). A generalized fear of agency enforcement action for failure to properly perform at some point in the future simply is not properly deemed protected activity under either Section 211 or Section 50.7.

employee."); *Parker v. U.S. Postal Serv.*, 819 F.2d 1113, 1116 (Fed. Cir. 1987) ("It is well established that the determination of the proper disciplinary action to be taken to promote the efficiency of the service is a matter peculiarly and necessarily within the discretion of the agency."). Because most nuclear employees are assigned to matters related to the safe operation of the nuclear facilities, the majority's view would yield the unintended consequence that most employees could be deemed to be engaged in protected activity. Licensees would then be placed in the impossible position of not being able to evaluate the performance of any of these employees, particularly with respect to their ability to resolve known issues and to address plant performance problems. If the majority's interpretation is allowed to stand, any employee who has participated in the resolution of any nuclear issue and who disagrees with a subsequent personnel action, would be encouraged to initiate claims without having even engaged in whistleblowing activity.

III. CONCLUSION

Based on the foregoing, NEI urges the Commission to reverse the Licensing Board's Initial Decision in this case and vacate the NOVs issued to TVA and the two individuals alleged to have engaged in discrimination.

October 2, 2003

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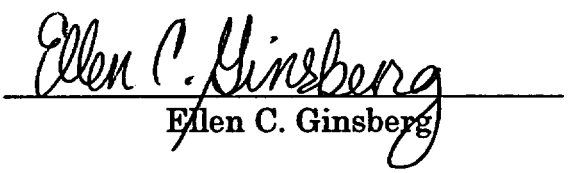

Ellen C. Ginsberg

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been served by messenger, or as shown by asterisk by overnight delivery, on the persons listed below. Copies of the document also have been sent by e-mail to those persons listed below with e-mail addresses.

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This 2nd day of October, 2003.

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October 2, 2003

BY MESSENGER

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Re: In the Matter of Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 & 2; Browns Ferry Nuclear Plant, Units 1, 2, & 3) - ASLBP No. 01-791-01-CivP - EA 99-234

Dear Ms. Vietti-Cook:

Enclosed please find for filing the original and two copies of the Brief Amicus Curiae of the Nuclear Energy Institute Supporting Reversal of the Atomic Safety and Licensing Board's Initial Decision in LBP-03-10. A copy of the brief has been served on all parties listed on the certificate of service.

Sincerely yours,

Ellen C. Ginsberg

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Enclosures
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