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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;	)	
Sequoyah Nuclear Plant, Units 1 &	)	
2; Browns Ferry Nuclear Plant,	)	EA 99-234
Units 1, 2 & 3)	)	

TENNESSEE VALLEY AUTHORITY'S BRIEF ON THE ISSUE OF MITIGATION

November 4, 2003

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TENNESSEE VALLEY AUTHORITY'S BRIEF ON THE ISSUE OF MITIGATION

I. INTRODUCTION

In this proceeding, the Tennessee Valley Authority (TVA) petitioned for review of the June 26, 2003, Initial Decision (ID) of the Atomic Safety and Licensing Board (Board), which found that TVA had discriminated against a whistleblower employee, Gary L. Fiser (Fiser). The NRC Staff did not file a petition for review, but informed the Commission that it did not object to review on a number of questions, including the "entirely unrelated question" of "the standards by which a Licensing Board should mitigate a civil penalty in a discrimination case" (CLI-03-09 at 4, 5). The Commission granted TVA's petition for review and also requested separate briefs on the issue of mitigation. TVA firmly believes that it did not violate 10 C.F.R. § 50.7 (2003) and that it is unnecessary for the Commission to decide the mitigation issue because protected activity was not a cause of Fiser's 1996 nonselection. Nevertheless, the Board correctly exercised its discretion to mitigate any penalty. The Board's mitigation of the penalty and the Staff's arguments on that issue only serve to underscore the absence of any violation.

II. ARGUMENT

The Board observed that the NRC's Enforcement Policy, NUREG-1600,[1] "permits adjustments of the civil penalties imposed based on discretion by the NRC" (ID at 67) and that "[t]his discretion may be exercised by the NRC Staff or, in a proceeding such as this, by the Atomic Safety and Licensing Board" (*id.*, *citing* 10 C.F.R. § 2.205(f) (2003)). The Board correctly exercised its discretion in this case to mitigate the proposed civil penalty based on two considerations. First, the Board concluded that TVA had "significant performance-oriented reasons" that played a "large part" in Fiser's nonselection (ID at 2), and that his "protected activities appear to have played a minor role in his failure to be retained" (ID at 67). Second, the Board noted that "'clarity of the requirement'" on which a violation is based is a factor for mitigation (ID at 66). Again citing "particularly the small role that protected activities may have played in leading to the adverse action," the Board recognized the novelty of its conclusion and the lack of "adequate notice" to TVA that a violation of the Atomic Energy Act, rather than Section 211 of the Energy Reorganization Act, "may be based not only where a significant portion thereof is premised on a substantial contribution of the protected activities (as under Section 211) ***but also where only a small part is premised on an employee's participation in protected activities***" (ID at 3, 66, 68; emphasis added throughout). The Board also recognized that by including "participation" in the resolution of already-identified concerns as a "protected activity," it was "broadly construing the scope of activities covered by that Section [§ 50.7]" (ID at 64). Thus, based on its assessment of the significance of the violation, and on the novelty of the regulatory standard being announced, the Board found that the civil

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1 Although a different version of the Enforcement Policy was in effect at the time of the purported violation and a different version was in effect during the hearing, citations herein are to the 1999 version of the "General Statement of Policy and Procedure for NRC Enforcement Actions," NUREG-1600, 64 Fed. Reg. 61,142 (Nov. 9, 1999), which was introduced by the Staff as SX-170.

penalty "should not have been escalated" but "should instead be mitigated" to $44,000 (ID at 68).

A. The Board Has Authority and Discretion to Mitigate the Civil Penalty. The Board majority recognized that the NRC's Enforcement Policy and 10 C.F.R. § 2.205(f) gives it the authority and the discretion to mitigate a civil penalty (ID at 2, 68). *See* 10 C.F.R. § 2.205(f) ("If a hearing is held, an order will be issued after the hearing by the presiding officer or the Commission dismissing the proceeding or imposing, ***mitigating***, or remitting the civil penalty"). Neither the Enforcement Policy nor the regulation limits the authority and discretion of the Board to mitigate civil penalties.

It is well established that a hearing before an NRC board on a civil penalty is a *de novo* hearing and that it is the board, not the Staff, "who finally determines on the basis of the hearing record whether the charges are sustained and ***civil penalties warranted.***" *Radiation Tech., Inc.*, ALAB-567, 10 NRC 533, 536-37 (1979). Consistent with *de novo* review, "the Administrative Law Judge (and this [Appeal] Board and the Commission on review) may substitute their own judgment for that of the [NRC Staff] Director" and that "if deemed to be warranted in the totality of circumstances, the adjudicator is entirely free to mitigate or remit the assessed penalty." *Atlantic Research Corp.*, ALAB-594, 11 NRC 841, 849 (1980) (cited in the Staff's brief at 8).

The NRC Staff would claim for itself the sole discretion to apply the Enforcement Policy (br. at 8). The Staff argues that because it "applies Commission policy in determining penalties," the Board should be relegated to deciding "whether the Staff has abused its discretion in applying the Commission's policy" (*id.*). This argument, however, would fundamentally alter the scope of the hearing opportunity provided by the regulations. The *de novo* nature of the hearing specifically extends to the civil penalty assessment and assures that a licensee has a full and fair opportunity for

independent hearing on all aspects of the Staff's enforcement decision.[2] Due process requires an opportunity for an independent and impartial hearing because, as the Board recognized in *Radiation Technology*, "the [Staff's] role in this situation is akin to that of a prosecutor," and therefore "is not the ultimate fact finder in civil penalty matters" (10 NRC at 536, 537).

Furthermore, the Enforcement Policy is a ***Commission*** policy, not the unique province of the Staff. The fact that the Staff initially applies the Enforcement Policy does not mean that the policy confers any exclusive discretion to the Staff with respect to determining civil penalty amounts. It is the Board's function in an enforcement hearing to act as the delegate of the Commission with the discretion to mitigate a civil penalty that is inherent in the ***agency's*** Enforcement Policy. The Staff argues (br. at 8) that because the Enforcement Policy was adopted in October 1980, it, in effect, overruled the decisions in *Radiation Technology* and *Atlantic Research*. That is not the case. *See Consol. X-Ray Serv. Corp.*, ALJ-83-2, 17 NRC 693,705 (1983) (mitigating a civil penalty in reliance on *Radiation Technology*, and stating that "[t]here is nothing in

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2 This new abuse of discretion standard of review advocated by the Staff is contrary to the Administrative Procedures Act (APA). Commission "administrative procedures are governed by sections 5 through 8 of the APA (5 U.S.C. §§ 554 through 557)" which "allow the members of the body which comprises the agency a choice of hearing and determining cases in the first instance themselves, or delegating that responsibility to subordinates while reserving the right to review their decisions." *Duke Power Co.*, ALAB-355, 4 NRC 397, 403 (1976). The Commission delegates to licensing boards the authority to make initial decisions. *Id.* at 403 n.14; 42 U.S.C. § 2241 (2000); 10 C.F.R. § 2.205(d)-(f). "'In making its decision, whether following an initial or recommended decision, the [commission] is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision—as though it had heard the evidence itself.'" *Duke Power Co.*, 4 NRC at 404, citing *Attorney General's Manual on the Administrative Procedures Act* 83 (1947). Similarly, under the APA, "the licensing boards are bound to base their decisions on what they judge to be the preponderance of the evidence adduced in the record." *Id.* at 405 n.19; *Hurley Med. Ctr.*, ALJ-87-2, 25 NRC 219, 224 (1987). Thus, the Staff's imposition of a civil penalty against TVA was subject to plenary review by the Board and also is subject to *de novo* review by the Commission. See 5 U.S.C. §§ 556-57 (2000).

the General Enforcement Policy which evinces an intent to alter the jurisdiction or authority of the presiding administrative law judge in a civil penalty matter.").[3]

Here, the Board's mitigation of the civil penalty was consistent with the Commission's Enforcement Policy. *Atlantic Research* recognized that a civil penalty may be mitigated as part of an assessment of "the totality of circumstances" (11 NRC at 849). Similar discretion is inherent in the Enforcement Policy itself. For example, Section IV of the policy allows for consideration of "the relative importance or significance of each violation" as "the first step in the enforcement process" (64 Fed. Reg. at 61,147). TVA firmly believes that Fiser was not selected for legitimate nondiscriminatory reasons. However, even the Board acknowledged that discrimination played a "small role" and that his protected activities were not a "significant" or a "substantial contribution" to his nonselection (ID at 68). Moreover, Section VI.B.2.d of the Policy provides for discretion to escalate or mitigate "to ensure that the proposed civil penalty reflects all relevant circumstances of the particular case" (64 Fed. Reg. at 61,153). This discretion is shown as a large "D" in the civil penalty logic tree included in the Policy (64 Fed. Reg. at 61,151). The Staff itself has specifically

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3 With the Staff's agreement, *Atlantic Research*, 11 NRC at 847, 848, rejected the proposition that the Board's review of the Staff's imposition of a civil penalty is subject to an abuse of discretion standard of review. (As the staff conceded there in its brief, "'[o]nce th[e] Licensee requested a hearing, it became the responsibility and duty of the . . . Administrative Law Judge to decide the case anew'" and "'[t]he Administrative Law Judge then had to arrive at a decision on whether the violations occurred, [and] whether ***and in what amount*** a civil penalty should be imposed'" (emphasis in original)). The law remains unchanged and the Staff recognized that the *de novo* standard of review applies in this case:

> MR. DAMBLY: I also agree with Your Honor's statement that this case rises and falls on what's presented to you. It's a trial *de novo* . . . . The facts are what the facts are presented to you.
>
> JUDGE YOUNG: Right and the [*de novo*] standard is the standard that we need to apply, and whatever standard was applied by the staff is irrelevant at this point.
>
> MR. DAMBLY: That's correct, Your Honor [Tr. 47].

exercised this discretion in the past to withdraw civil penalties based on a lack of prior notice of regulatory requirements.[4] When measured against the Policy itself, therefore, the Board majority appropriately exercised discretion granted to it.

B. The Board Did Not Apply "Comparative Negligence." The Staff argues (br. at 3) that in mitigating the civil penalty the Board was somehow applying a "comparative negligence" standard. The Staff emphasizes that the purported violation of Section 50.7 in this case was a "complete violation," and, therefore, that the civil penalty could not be mitigated based on the Board's conclusion that protected activities played only a "minor role" in Fiser's nonselection. The Staff confuses the process of finding of a violation with a civil penalty assessment.

TVA disagrees with the Staff's and the Board's conclusion that protected activities even "played a minor role" or contributed, in any sense, to Fiser's non-selection. As the Board found, Fiser was in competition for a new position arising out of a legitimate nuclear-wide reorganization. *See* ID at 48 ("[T]his reorganization was motivated by legitimate business reasons and was not *per se* intended to discriminate against any individual"). His nonselection was the result of a standard process, involving individuals other than the two officials alleged to have committed the discrimination (TVA FoF ¶ 9.36). During that competition, another employee-candidate was determined to be a better choice by the Selection Review Board (SRB), based on their own interviews and their own scoring of the candidates (JX22 at GG420, 439, 456; TVA FoF ¶¶ 9.34-.37). Despite finding that Fiser's "protected activities

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4 For example, on April 27, 1990, the NRC withdrew two proposed enforcement actions including penalties (EA 89-130 and 89-172), because of industry concerns that the Staff was imposing new, generic requirements by enforcement without prior notice. *See also* EN 98-006 (EA 97-138) (February 13, 1998) (exercising discretion to not propose a civil penalty based on the licensee's "apparent misinterpretation" of generic regulatory guidance); EN 99-011 (March 24, 1999) (exercising discretion not to propose a civil penalty for a fire protection matter, and indicating a plan to "issue a generic communication to address the apparent misunderstanding of the requirements by licensees"). (Copies of these decisions are reproduced in Addendum A.)

appear to have played a ***minor role*** in his failure to be retained," the Board found a violation (ID at 67). However, the Board made no finding that the Human Resource professionals who determined that the job was subject to competition or that the SRB members who scored the interviews acted with any discriminatory animus (ID *at passim*). The Board then applied the discretion called for by the Enforcement Policy to determine the appropriate civil penalty for the violation that it found—based on the significance of the violation and after considering "all relevant circumstances" of the case (Enforcement Policy VI.B.2, 64 Fed. Reg. at 61,151). From the Board's perspective, this *was* "a complete violation." The Staff's argument that "a complete violation" precludes mitigation of a penalty, would lead to the absurd result that all violations must be treated equally for civil penalties. A "postage stamp" rule—the indiscriminate application of a fixed penalty—has never been the Staff's practice, nor should it be in this case. *Radiation Technology*, 10 NRC at 541 ("[A]ssessing a penalty inherently calls for the exercise of informed judgment on a case-by-case basis. An absolute uniformity of sanctions (which the licensee appears to think necessary) is neither possible nor required.").

C. The Board's Mitigation Based on the Minor Significance of the Alleged Discrimination Was Appropriate. The Staff argues (br. at 3) that the "Board's finding that adverse actions against Fiser were predicated in large part on performance issues is contrary [ ] to the record" and to TVA's "admissions." The Staff characterizes the Board's findings as showing that "TVA misrepresented its reasons" for Fiser's nonselection (br. at 4). The Staff concludes, somehow, that the Board's mitigation analysis would "make a mockery of [TVA's] compliance with 10 C.F.R. § 50.9" (*id.*) The Staff's argument mischaracterizes the Board's decision and TVA's position, and underscores the absence of discrimination in Fiser's nonselection. Further, the Staff's argument is not a valid reason against mitigation.

To the extent the Staff is saying that the Board found that Fiser's nonselection was predicated on ***his*** job performance, it has mischaracterized the Board's

decision. The Board did find that TVA had "significant performance-oriented reasons" that "played a large part" in Fiser's nonselection (ID at 2). That finding was clearly correct; but it does not refer to Fiser's job performance. The Board was referring there to his nonselection coming "about in the context of a massive 1996 reorganization" which was undertaken to improve efficiency and to focus on operating, rather than constructing, five reactors (ID at 2, 47).[5]

Further, it has always been TVA's position and the evidence shows that Fiser's nonselection resulted from a competitive selection process in which qualified candidates were interviewed and scored by the SRB.[6] The applicants' past performance was a factor considered by the selecting manager (McArthur) only to determine which candidates would be interviewed (JX21 at GG212; Tr. 1498-99, 1504-05 (McArthur))[7];

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5 The Staff's failure to petition for review precludes it from contesting the Board's findings.

6 The Staff correctly states (br. at 4) that TVA's Reduction-in-Force procedures do not allow it to consider performance in determining the rights of incumbents. However, the Staff's assertion that such a decision is "strictly based on duties performed" (br. at 4) is a misrepresentation of the record. That may be the way the Staff thinks TVA should make the decision or the way the NRC makes such decisions (SX 135 at 35,54-55,57, 61, 62-63; Tr. 3388, 3390, 3471-73, 3488, 3492, 3903-05), but *all* of the evidence shows that TVA makes such decisions based on official job descriptions. This point, as to the undisputed way that TVA conducts its Human Resource functions, is fundamental to the Board's findings about the decision to advertise the two positions that Fiser and McArthur sought. In 1996, TVA did not consider individual performance in the decision to compete the new Chemistry Program Manager positions, nor did it consider the actual duties being performed. Rather, TVA competed the positions based on a comparison of position descriptions by Human Resources and its determination that the positions were not "interchangeable" (JX65 at 14-15; SX135 (Boyles at 32-33); Tr. 5414-15 (Fogleman)).

7 The Staff misstates the record when it claims that "performance appraisals were not made available to the Selection Review Board and were not considered by the selecting official as required by TVA procedures" (br. at 4). TVA procedures do not require that performance appraisals be made available to the SRB, whose sole function is to score the candidates based on structured interview questions without regard to past work performed (JX63 at 2; Tr. 2851-52 (Corey)). Further, the record shows that McArthur, the selecting manager, did have access to and consider performance appraisals of the candidates (JX21 at GG212; Tr. 1498-99, 1504-05 (McArthur)).

the SRB members, however, scored the candidates, including Fiser, based only on their assessment of the responses to the interview questions (Tr. 2988-90 (Corey), 3144-47 (Kent), 5172, 5199-5200 (Rogers)).[8] McArthur selected another candidate over Fiser by simply following the recommendation of the SRB (JX21 at GG212).

Nonetheless, Fiser's past performance is important to this case. His performance from 1989-92 is now asserted to be "protected activity." However, the record shows that Fiser, rather than engaging in protected activity, in fact had a history of performance problems associated with his ***failure*** to identify and/or resolve issues that had been identified by others and that management wanted resolved. *See* TVA Initial Brief at 2-8, 16-19. His lack of performance in this timeframe does not, under any valid legal construct, constitute protected activity. Moreover, his performance did not provide any basis whatsoever for a retaliatory motive on the part of the two charged TVA managers. Instead, Fiser's performance (or lack thereof) constituted a legitimate basis for certain employment decisions between 1991 and 1993 affecting Fiser that have been included by the Board majority in its unfounded list of a "plethora of career-damaging situations and circumstances." *See* TVA Initial Brief at 36-38.

Nor does the Staff's argument on what caused Fiser's 1996 nonselection constitute a valid argument against mitigation. The Board allowed mitigation based on ***its*** findings of a violation and underlying facts. Having found a violation, it applied ***its*** view of the facts to mitigate the civil penalty. As discussed above, while TVA disputes the Board's finding of discrimination and its theory of protected activity, the Board had the discretion and authority to mitigate the civil penalty based on ***its*** view of "the small role that protected activities may have played in leading to the adverse action" (ID

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8 The Board finding (ID at 67) that Fiser's nonselection was "premised at least to some degree" on his work history is not explained by the Board. However, the SRB considered Fiser's job history to the extent he answered their questions about his strengths and weaknesses, projects he helped to initiate (JX20 at GG42), and his "specific management experience and training" (*id.* at 43). Because his answers to those and every question were scored lower than the other candidates, the SRB recommended two other candidates over Fiser.

at 68). The record shows that the selected candidate was both better qualified for the job than Fiser and performed significantly better during the SRB interviews (ID at 59-60; TVAX 141; Tr. 4260-64 (Fiser); TVA FoF ¶ 9.37). Moreover, the Staff did not even attempt to show that Fiser was better qualified or should have been selected. The record, therefore, actually supports a finding of *no* violation. Here, where it was found that TVA had significant legitimate nondiscriminatory reasons for its actions, and where discrimination was not found by the Board to have been "the primary or substantial" cause of Fiser's nonselection, the Staff is in no position to argue that the record does not support mitigation of a portion of the civil penalty.

Finally, we are surprised that the Staff would urge an issue regarding compliance with 10 C.F.R. § 50.9, an issue as to which the Commission specifically did not grant review (CLI-03-09 at 5-6). Suffice it to say, TVA has not "misrepresented its reasons" for Fiser's nonselection. While TVA believes the Board majority reached an erroneous conclusion, TVA has consistently explained its position throughout the Staff's investigation, predecisional enforcement conference, discovery, and hearings in this case. As just one example, the presentation slides from TVA's December 10, 1999, predecisional enforcement conference (SX 135) highlight TVA's consistent explanation of the SRB process used to conduct the interviews, score the candidates, and to make the selection in 1996.[9]

Obviously, given the multiplicity of investigation interviews, depositions, enforcement conferences, and hearings that have been conducted in the seven years since the selection in 1996, there have been numerous opportunities for the Staff to misunderstand (and/or misconstrue) what is being said by TVA and to perceive inconsistencies—even where no inconsistencies exist. Moreover, it cannot in any sense be surprising that further details and clarifications have been developed during protracted litigation of the events surrounding the alleged violation. The asserted violation was originally stated in exactly one paragraph in the Staff's Notice of Violation

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9 *See* Slides 8-10, copies of which are included as Addendum B to this brief.

(JX47 at AB26). The Staff simply exhibits too much zeal in brandishing the sword of Section 50.9 where it disagrees with TVA's position or the Board's findings. In the context of mitigation, the Staff's argument makes no sense. In the broader context of the agency's enforcement program, the Staff's implied threat of a Section 50.9 violation could very well "chill" the exercise of the right of licensees to disagree with the Staff's enforcement positions and to pursue a hearing on an enforcement action.

In fact, the continuing changes in the Staff's theory of the violation provide an additional reason for mitigation which was not considered by either the Board or the Staff. In the Enforcement Policy, Section III, the Commission expresses an interest in certain enforcement cases where an Office of Investigations (OI) report and the Staff arrive at different conclusions concerning issues of intent (64 Fed. Reg. at 61,147). In this case, the NOV was so at odds with the prior OI report (*see* JX 44 at AB7) that the Staff objected to admission of the report into evidence (Tr. 88-103). The NOV itself differed from the theory of the case advanced by the Staff at the hearing (Staff FoF at 94-98; TVAX 113), which in turn differed from the theory adopted by the Board. Thus, TVA did not violate Section 50.9. Rather, TVA was denied fair notice, further supporting mitigating an already unwarranted penalty. *Hurley Med. Ctr.*, ALJ-87-2; 25 NRC 219, 224-25 (1987); *Radiation Tech.*, 10 NRC at 536-37; *Niagara Mohawk Power Corp.*, ALAB-264, 1 NRC 347, 354-55 (1975).[10]

D. The Board's Mitigation Based on Lack of Notice of the Legal and Evidentiary Standards to be Applied in Section 50.7 Cases Was Appropriate. The Staff argues (br. at 5, 7) that mitigation was inappropriate based on the Board's conclusion that there was inadequate prior notice of the Staff's (and Board's) interpretation of Section 50.7. The Staff argues: (1) that TVA could not be disadvantaged by the standard; (2) that the Staff and TVA have agreed upon the Department of

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10 The penalty was also subject to be mitigated in accordance with the Enforcement Policy (64 Fed. Reg. at 61,156-57), since TVA unconditionally offered Fiser the job he sought prior to any decision by DOL (Tr. 3440-46 (Reynolds)).

Labor (DOL) standard for determining violations of Section 211; and (3) that TVA in any event was liable for a *per se* violation of Section 50.7 based on Charles Kent's cautionary comment on the morning of the SRB interviews (a conclusion that the Board did not adopt). These arguments provide no basis to overturn the Board's exercise of mitigation discretion.

First, the Board's decision is the first attempt by an NRC administrative board, in an adjudicatory context, to announce a framework for analysis of a Section 50.7 enforcement case. As TVA argued in its Initial Brief (at 19-22), and as NEI also argued, the Board did not articulate a workable, defensible framework—one that includes the necessary standards for causation in "pretext" or "dual motive" cases, as well as the appropriate evidentiary burdens. Nonetheless, this was a first attempt to do so. The Commission itself also previously declined to address the legal standard to be applied to Section 50.7 cases in its assessment of the final report of the Staff's Discrimination Task Group sent to the Commission in September 2002.[11] Moreover the Board majority's interpretation of protected activity to include "participation" in the resolution of already identified issues is new and previously unknown to the law.

Second, TVA and the NRC Staff have agreed in the past, in principle, that DOL interpretations of Section 211 do provide an appropriate body of case law to apply to Section 50.7 cases—at least to establish a framework for analysis. However, TVA has never agreed that, as the Board majority found and the Staff would apparently approve, an inference of "any degree of discrimination" (*i.e.*, discriminatory intent)

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11 See generally "Staff Requirements Memorandum" - SECY-02-0166 - Policy Options and Recommendations for Revising the NRC's Process for Handling Discrimination Issues (March 26, 2003). It should also be noted that the Millstone Independent Review Team (MIRT) Report, referenced by the Board majority, also was not an adjudicatory decision, was never specifically adopted by the Commission, and in any event only addressed the issue of when an enforcement action should be pursued (*i.e.*, initiated). *See Duke Power Co.*, 4 NRC at 416 (A Staff working paper that has "been neither adopted nor sanctioned by the Commission itself and does not represent (or purport to represent) current Commission policy" "has no legal significance" (internal quotes omitted)).

that in "any degree contributed toward an adverse personnel action," would be a violation, "even though not the primary or even a substantial basis for the action" (ID at 18).[12] The Board majority's standard is the "drop of water into the ocean" standard which was rejected in the MIRT Report (at 8). It is *not* the DOL standard under Section 211. Likewise, it is *not* the standard adopted by the Supreme Court for cases under Title VII of the Civil Rights Act and other antidiscrimination statutes. Nor can the Staff claim the existence of an agreement that "participation" should be included as a protected activity since this theory was new with the Board and never even urged by the Staff. The Staff's argument with respect to mitigation overly simplifies the legal issues to portray agreement where there is in fact disagreement.[13]

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12 Both the Board majority and the Staff mischaracterize TVA's position to be that "the protected activities in which it concedes Mr. Fiser engaged were "'insignificant'" (ID at 4) to mean that TVA was arguing that "a little discrimination is acceptable if it makes it easier for managers to efficiently operate their facilities" (br. at 6, n.10; ID at 64). TVA's position is, and always has been, that whatever protected activities Fiser may have engaged in were so insignificant that they could not and did not motivate anyone to harbor a discriminatory animus toward him which would then be exercised against him at least four years later (TVA Initial Br. at 21; TVA Reply FoF at 95-98).

13 The Staff mischaracterizes TVA's position as to which it claims the existence of a dispute (br. at 6). According to the Staff, TVA "wish[es] to incorporate" into the Section 50.7 standard the provision from Section 211(b)(3)(D) of the ERA that denies a remedy to an individual complainant where an employer proves that it would have undertaken the adverse action even in the absence of any protected activity. That is not TVA's position. Section 50.7 was promulgated in 1982 before the Energy Policy Act of 1992 added Section 211(b)(3)(D) to the ERA. In adding that section to the ERA, Congress created a distinction between a finding of discrimination and an employee's entitlement to a remedy. Prior to 1992, an employer could avoid both a finding of discrimination and liability for remedies by proving that it would have undertaken the adverse action in the absence of any protected activity. After the 1992 amendments, an employer could be found to have discriminated but not be liable for equitable relief. It is not TVA's position that Section 211(b)(3)(D) should be incorporated into the Section 50.7 analysis. Rather, the issue of liability under Section 50.7 should be analyzed in accordance with Section 210 as it existed prior to the 1992 amendments since Section 50.7 was patterned after Section 210 and has not been amended to reflect the distinction in Section 211(b)(3)(D) between a finding of discrimination and liability for providing relief. Although the NRC amended Section 50.7 in 1993 to add the protected activities added by the 1992 amendment, it did not change the analytical

Third, TVA *was* disadvantaged by lack of prior notice of the Board's new standards. The Board majority establishes a framework that would result in a violation in any case where there is any ***inference*** of retaliatory motive, regardless of TVA's explanation, or causation, or proof by a preponderance of evidence. The negative inference could be drawn from a manager's knowledge of protected activity; from a mere assertion of temporal proximity between some protected activity and adverse action; from an irregularity or subjectivity perceived by the Staff or the Board in a selection process (*e.g.*, interview questions that were not "fair" to the "protected" employee because they did not somehow allow him/her to demonstrate strengths); from "disparate" treatment perceived by the Staff or the Board with respect to the "discriminating" manager that was not the "protected" employee (and notwithstanding that the protected employee was treated the same as everybody else); or from the perception that the "protected" employee did not have a friend or advocate on an SRB. Had TVA known this was the framework in 1996, and that there would be no requirement that the Staff actually demonstrate ***by a preponderance of the evidence*** that a nonselection was ***caused by*** discrimination, TVA could have taken the only action possible to avoid a violation when judged against that threshold. It could have selected Fiser for the PWR position, notwithstanding that his work performance record was less than stellar, notwithstanding that another candidate was better qualified to meet TVA's needs for the position at the time, and notwithstanding that the other candidate performed better in the crucial interview. Of course, from a management perspective, this would have been the wrong result, and it would have involved giving the protected employee unwarranted special treatment, which is contrary to the law (*see Chappell v. GTE Prods. Corp.*, 803 F.2d 261, 266-68 (6th Cir. 1986)). But prior notice of the legal standard could have prevented a violation and civil penalty.

(. . . continued) paradigm for liability that existed in Section 210 prior to the Energy Policy Act of 1992. Section 50.7 still incorporates no more or less than a ***causation standard*** for liability.

The Staff's argument that there was a *per se* violation of Section 50.7 in the cautionary remark of Kent is both incorrect as a matter of law and irrelevant to the Board's mitigation analysis. The Staff did not issue a notice of violation regarding that comment and the Board did not find one.[14] *See also* TVA's Initial Brief (at 15, 35-36). Suffice it to say, the Staff misreads the cases that it cites and advocates an unreasonable, counterproductive position.[15] Moreover, the Staff's argument is irrelevant to the issue of mitigation. Had the Board adopted the argument, it too would have been a new NRC position—another for which TVA had no prior notice. Therefore, the Board's reason for mitigation would continue to apply.

CONCLUSION

As discussed above, the bases for the Board's exercise of discretion in mitigating the civil penalty further emphasize the absence of any violation. Based on the foregoing reasons and authorities, the Commission should reject the Staff's arguments with respect to mitigation of the civil penalty.

---

14 The Staff's argument that there were multiple violations (br. at 8) is unavailing. The Staff issued one notice of violation which was sustained by the Board. There is no basis for the Staff's *post hoc* assertions of additional violations as a basis to have the Board rubberstamp the civil penalty the Staff would assess. The Board was not free to add additional violations as an afterthought. As pointed out in *Hurley Med. Ctr.*, 25 NRC at 224, a presiding officer "may not impose a penalty on any theory of the case not timely advanced by the NRC Staff."

15 The Staff's discussion (br. at 7) of *Earwood v. Dart Container Corp.*, 93-STA-16 (Sec'y Dec. 7, 1994), shows that it is irrelevant to Kent's cautionary comment. Instead of standing for the proposition that the mere mention of protected activity is a *per se* violation, *Earwood* underscores (at 3 n.1) that in the context of a blacklisting claim, for a reference to protected activity to be improper, there must be "discriminatory purpose" or retaliatory motive with "'language or instruction detrimental to Complainant.'"

Respectfully submitted,

November 4, 2003

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General Counsel

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Tennessee Valley Authority
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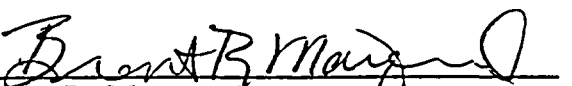

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CERTIFICATE OF SERVICE

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

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This 4th day of November, 2003.

Brent R. Marquand
Attorney for TVA

ADDENDUM A

UNITED STATES
NUCLEAR REGULATORY COMMISSION
REGION V
1450 MARIA LANE, SUITE 210
WALNUT CREEK, CALIFORNIA 94596

APR 27 1990

Docket No. 50-397
License No. NPF-21
EA 89-130

Washington Public Power Supply System
ATTN: Mr. Donald W. Mazur
Managing Director
Post Office Box 968
3000 George Washington Way
Richland, Washington 99352

Gentlemen:

SUBJECT: WITHDRAWAL OF NOTICE OF VIOLATION AND PROPOSED IMPOSITION OF CIVIL PENALTY (EA 89-130)

By a letter dated December 21, 1989 I sent you a Notice of Violation and Proposed Imposition of Civil Penalty (Notice) in the amount of $50,000 which resulted from a violation of 10 CFR Part 50, Appendix B, Criterion III that was identified during an inspection conducted on March 27 - April 7 and May 8-26, 1989. This action related to your program for dedication of commercial grade equipment for use in safety-related systems.

This enforcement action is being withdrawn without reaching the merits. This action is being taken because the NRC staff has determined, and the Commission has agreed, that escalated enforcement action on individual cases is not the appropriate response for what appears to be an industry-wide problem.

If you have any questions concerning this action please contact me.

Sincerely,

John B. Martin
Regional Administrator

cc: Sorman 280
Gowen 927M
Oxsen 1023

MAY 01 RECD

UNITED STATES
NUCLEAR REGULATORY COMMISSION
REGION II
101 MARIETTA STREET, N.W.
ATLANTA, GEORGIA 30323

APR 27 1990

Docket No. 50-302
License No. DPR-72
EA 89-172

Florida Power Corporation
Mr. P. M. Beard, Jr.
Senior Vice President, Nuclear Operations
ATTN: Manager, Nuclear Operations
Licensing
P. O. Box 219-NA-21
Crystal River, FL 32629

Gentlemen:

SUBJECT: WITHDRAWAL OF NOTICE OF VIOLATION AND PROPOSED IMPOSITION OF CIVIL PENALTY (EA 89-172)

By a letter dated December 1, 1989, I sent you a Notice of Violation and Proposed Imposition of Civil Penalty (Notice) in the amount of $50,000 which resulted from a violation of 10 CFR Part 50, Appendix B, Criterion III that was identified during an inspection conducted on April 24 - May 5, 1989. This action primarily related to your program for dedication of commercial grade equipment for use in safety-related systems.

The portion of this enforcement action concerning dedication of commercial grade items is being withdrawn without reaching the merits. This action is being taken because the NRC staff has determined, and the Commission has agreed, that escalated enforcement action on individual cases is not the appropriate response for what appears to be an industry-wide problem.

We have reconsidered the portion of the Notice concerning the pump impeller that was purchased as a safety related item. Based on available information, we have concluded that this violation should be recategorized at Severity Level IV. In view of this decision and the fact that the problem was identified by your staff and corrected, the violation meets the criteria for non-cited violations in Section V.G.1 of the Enforcement Policy. Accordingly, this is being withdrawn as a formal citation and will be considered a non-cited violation.

If you have any questions concerning this action please contact me.

Sincerely,

Stewart D. Ebneter
Regional Administrator

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February 13, 1998
EN 98-006

OFFICE OF ENFORCEMENT
NOTIFICATION OF SIGNIFICANT ENFORCEMENT ACTION

Licensee: Washington Public Power Supply System (EA 97-138)
Washington Nuclear Project-2 (WNP-2)
Docket No. 50-397
License No. NPF-21

Subject: EXERCISE OF ENFORCEMENT DISCRETION

This is to inform the Commission that the staff intends to exercise enforcement discretion per Section VII.B.6 of the Enforcement Policy and not propose a civil penalty for violations identified at the WNP-2 reactor facility. The key violations involve failures to test the response time of various plant instrumentation systems, and the failure to obtain approval from the NRC as required by 10 CFR 50.59 before ceasing response-time testing required by technical specifications. A total of four violations are classified in the aggregate as a Severity Level III problem, and will be cited in a Notice of Violation to the company.

The decision to exercise enforcement discretion is based on consideration of the following: the apparent misinterpretation of NEDO-32291 guidance, which the NRC had approved generically and which appears to have resulted in three other boiling water reactor licensees making the same series of mistakes; the fact that all of the instruments in question were tested and would have performed their intended functions; and the fact that the response time verification portion of the calibration methodologies employed by the Supply System were ultimately accepted by the NRC.

It should be noted that the licensee has not been specifically informed of the NRC's plans to exercise enforcement discretion in this case. The staff plans to issue the Notice of Violation and inform the licensee that no civil penalty is being assessed on February 20, 1998.

The State of Washington will be notified.

Contacts: T. Reis, OE, 415-3281 J. Lieberman, OE, 415-2741

Distribution

OWFN	OWFN		TWFN	Regional Offices	
Chairman Jackson	EDO	OC		RI	RIV
Comm. Dicus	DEDE	AEOD		RII	WCFO
Comm. Diaz	OE	OP CTR		RIII	
Comm. McGaffigan	OGC	NMSS			
SECY	NRR	IRM		MAIL	
OCA	OI	OIG		NUDOCS	
PA	SP	RES		PUBLIC	
IP	ACRS				

PRELIMINARY INFORMATION - NOT FOR PUBLIC DISCLOSURE UNTIL VERIFICATION THAT LICENSEE HAS RECEIVED ACTION

3

March 24, 1999
EN 99-011

OFFICE OF ENFORCEMENT
NOTIFICATION OF SIGNIFICANT ENFORCEMENT ACTION

Licensee: Florida Power and Light Company
St. Lucie Nuclear Plant
Docket Nos. 50-335 and 50-389

Subject: EXERCISE OF ENFORCEMENT DISCRETION

This is to inform the Commission that staff intends to exercise discretion pursuant to Section VII.B.6 of the Enforcement Policy and not issue a Notice of Violation or propose a civil penalty for a Severity Level III violation identified by the NRC during a Fire Protection Functional Inspection at the St. Lucie facility. Specifically, the licensee failed to analyze for the potential for more than one fire induced circuit failure that could cause maloperation of designated safe shutdown equipment in all aspects of its safe shutdown analysis. The analysis of multiple fire induced circuit failures has been the subject of continuing discussions with the Nuclear Energy Institute and the NRC. The Office of Nuclear Reactor Regulation intends to issue a generic communication to address the apparent misunderstanding of the requirements by licensees.

Discretion is appropriate in this case given that the totality of the inspection findings, and the actions the licensee took in areas directly related to this concern prior to the inspection, make it evident that the licensee's failure to identify this noncompliance stemmed from its misinterpretation of the requirements and not unresponsiveness to NRC concerns or positions. Additionally, Florida Power & Light took prompt, appropriate actions in this case despite its disagreement that the issue constitutes a violation.

It should be noted that the licensee has not been specifically informed of the enforcement decision. The schedule of issuance of the report and notification is:

Mailing of Inspection Report March 31, 1999
Telephone Notification of Licensee March 31, 1999

The State of Florida will be notified.
No response is required from the licensee for this Exercise of Enforcement Discretion

Contacts: T. Reis, OE, (301) 415-3281 J. Lieberman, OE, (301) 415-2741

Distribution

OWFN	OWFN	TWFN	Regional Offices
Chairman Jackson	EDO	OC	RI ___ RIV ___
Comm. Diaz	DEDE	AEOD	RII ___
Comm. McGaffigan	OE	OP CTR	RIII ___
Comm.	OGC	NMSS	
SECY	NRR	IRM	MAIL
OCA	OI	OIG	NUDOCS
PA	SP	RES	PUBLIC
IP		ACRS	

PRELIMINARY INFORMATION - NOT FOR PUBLIC DISCLOSURE UNTIL VERIFICATION THAT LICENSEE HAS RECEIVED ACTION

OE:TReis 03/24/99 OE:JLieberman 03/24/99

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ADDENDUM B

Predecisional Enforcement Conference

Tennessee Valley Authority

December 10, 1999

TVA NUCLEAR

ABC00032

Enclosure 4

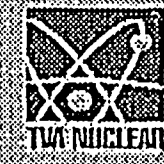
Selection Process Was Not Contrived

TVA NUCLEAR

- Selection Review Board Used To Conduct Interviews
  - Selection Review Board Process and Briefing Books Consistent With Standard TVAN Practice
  - Standard Set of Questions Prepared and the Same Board Member Asked Same Questions of Each Interviewee
  - No Collaboration of Interview Scores
  - Results of PWR Chemistry Selection Review Board Interviews Not Different From Results of Other Board Interview Results
  - McArthur's Selection Decisions Consistent with Selection Review Board Results in Every Case
  - No Pressure Placed on Selection Review Board to Non-Select Fiser

2

Selection Process Was Not Contrived



- Selection Review Board Used To Conduct Interviews
  - Selection Board Membership Recommended by Rad Con and Chemistry Peer Team and Accepted by McArthur
  - Selection Review Board Had Three Qualified Members (Rogers, Corey, and Kent) and an Independent Facilitator From Human Resources (Westbrook)
  - Cox Removed Himself Because of Schedule Conflict
  - McArthur Tried to Get Watts Bar Assistant Plant Manager As Substitute
  - Qualified Substitute (Rogers) Found to Support Selection Schedule

There Was No Pre-Selection

TVA NUCLEAR

- OI Report Summary States That Mr. Harvey Was Pre-Selected
- No Pre-Selection Occurred
  - McGrath and McArthur Denied Any Pre-Selection of Harvey
  - Harvey Declaration Provides Important Perspective on Conversations That Occurred Between Harvey and Watts Bar Chemistry Manager
  - Structured TVA Selection Process Used (and Augmented) to Fill New Positions in Organization

AB000041