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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	Docket Nos. 50-390-CivP; 50-327-CivP
TENNESSEE VALLEY AUTHORITY	)	50-328-CivP; 50-259-CivP
(Watts Bar Nuclear Plant, Unit 1	)	50-260-CivP; 50-296-CivP
Sequoyah Nuclear Plant, Units 1 & 2	)	
Browns Ferry Nuclear Plant, Units 1,2 &3)	)	
	)	ASLBP No. 01-791-01-CivP
	)	
	)	EA 99-234

NRC STAFF REPLY TO INITIAL BRIEFS OF THE TENNESSEE VALLEY AUTHORITY AND THE NUCLEAR ENERGY INSTITUTE

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November 3, 2003

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES

UNITED STATES COURTS OF APPEALS CASES

NUCLEAR REGULATORY COMMISSION CASES

TABLE OF AUTHORITIES

Page

DEPARTMENT OF LABOR CASES

FEDERAL STATUTES

TABLE OF AUTHORITIES

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INTRODUCTION

Pursuant to the "Memorandum and Order" dated August 28, 2003, CLI-03-09, ("Order"), the NRC Staff ("Staff") now responds to the initial briefs filed in this appeal by the licensee, Tennessee Valley Authority ("TVA") and the Nuclear Energy Institute ("NEI").[1] As set forth more fully below, the Staff believes that the appropriate standard to apply in discrimination cases arising under 10 C.F.R. § 50.7 ("Section 50.7") is the same standard which is set forth in Section 211 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851("Section 211")("ERA"), that the decision of the Licensing Board in this case is fully consistent with that standard, and that the Board's finding of discrimination was consistent with the record before it.

BACKGROUND

On February 7, 2000, the Staff issued a Notice of Violation and Proposed Imposition of Civil Penalty (NOV) in the amount of $110,000 to TVA. The NOV was premised upon TVA's non-

[1] NEI was permitted to participate as an *amicus*. Order at 6.

selection of Gary Fiser for any position resulting from a TVA reorganization due in part to Fiser's engaging in "protected activity" as proscribed by Section 50.7. Following TVA's denial of the violation, on May 4, 2001, the Staff issued an Order Imposing Civil Monetary Penalty. 66 Fed. Reg. 27,166 (May 16, 2001). On June 21, 2001, TVA requested a hearing on that Order. Following a lengthy hearing, the Atomic Safety and Licensing Board issued a decision on June 26, 2003, in which a majority of the Board found that a violation of section 50.7 had occurred but that the penalty should be reduced to $44,000. *See Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1&2; Browns Ferry Nuclear Plant, Units 1,2 & 3), LBP-03-10, 57 NRC ___, slip op. at 2. ("I.D.") On July 16, 2003, TVA petitioned for Commission review of the Board's decision, and on August 28, 2003, the Commission granted the petition and set a briefing schedule under which the Staff now responds to the initial briefs of TVA and NEI.[2]

DISCUSSION

I. TVA Failed to Demonstrate That The Board's Factual Findings Were Clearly Erroneous

In accordance with 10 C.F.R. § 2.786(b)(4)(i), the standard for overturning factual findings made by a licensing board is that the findings are "clearly erroneous". The Staff submits that this high standard has not been met by TVA.

A. The Commission's Standard For Review Of A Board's Findings Of Fact Is Very High

The Commission recently addressed its standard for reviewing factual findings made by licensing boards. In *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-08, 58 NRC ___ (August 15, 2003), the Commission reiterated that the standard for

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[2] The essential facts and description of the principal individuals involved in this proceeding were set forth by the Board in its Initial Decision. The Staff will not burden the record by reciting them again. A more complete description of the facts can be found in the Staff's Findings Of Fact and Conclusions of Law Concerning The Tennessee Valley Authority's Violation of 10 C.F.R. 50.7, dated December 20, 2002. ("Staff FOF")

determining that a licensing board's factual findings were clearly erroneous is quite high and requires that such "findings were not even 'plausible' in light of the record viewed in its entirety." *Id.* at 14, *quoting Kenneth G. Pierce,* CLI-95-6, 41 NRC 381, 382 (1995) *quoting Anderson v. Bessemer,* 470 U.S. 564, 573-576 (1985). It is not enough that the record could support a sharply different view than that of the Board. *Id.* Furthermore, the Commission has stated that its "deference to the Board as factfinder is particularly great where, as here, the Board bases its findings of fact in significant part on the credibility of the witnesses." *Private Fuel Storage* at 14. In the instant case, *Anderson, supra,* is especially compelling since the Supreme Court held in *Anderson* that a finding of discrimination is a factual finding to which the clearly erroneous standard applies. *Anderson,* 470 U.S. at 573.

Thus, in order for TVA to prevail, it must demonstrate that there is no plausible way that the Board could have concluded from its review of the record and its credibility determinations that Fiser was the victim of discrimination. TVA clearly has not even remotely approached this high standard.

B. TVA Presented The Same Arguments Previously Considered And Rejected By The Board

The nine areas of clearly erroneous factual findings alleged by TVA[3] are nothing more than a recitation of the same arguments the Board considered and rejected in reaching its findings. Rearguing or repackaging the same rejected arguments does not demonstrate that the Board's factual findings, including its finding of discrimination, were clearly erroneous.

Moreover, many of the alleged erroneous factual findings are mischaracterizations of the record by TVA. For example, TVA alleges that McArthur had nothing to do with Fiser's reduction in force ("RIF") in 1993. TVA Petition at 5 ¶ 7. However, McArthur was Fiser's supervisor at the

[3] See Tennessee Valley Authority's Petition for Review Of Initial Decision in LBP-03-10, dated July 16, 2003, at 4-5. ("TVA Petition").

time and was also the one who told Fiser that his position was being eliminated. Tr. 1430-1431. TVA also alleges that the Chemistry Superintendent position at the Sequoyah Nuclear Plant ("SQN") was eliminated and that led to Fiser's RIF. TVA Initial Brief at 5. The record is clear, however, that the position was never eliminated. Staff FOF at 13 ¶ 2.33

TVA asserts that McArthur did not select the questions propounded by the Selection Review Board ("SRB"). TVA Petition at 4 ¶ 3. While true, it is also quite disingenuous as the record is clear that McArthur wrote all but one of the questions. Staff FOF at 45 ¶ 2.137.

TVA's assertion that there was no disparate treatment between McArthur and Fiser is baseless. McArthur was non-competitively placed in a higher graded position, contrary to TVA's own procedures. Specifically, the position in which he was placed was not interchangeable with either the position he occupied at the time of the reorganization or the long-abolished position he allegedly still occupied because of his disappearing position description. Staff FOF at 48-52 ¶¶ 2.146-2.152. Even the dissenting Board member found that there was disparate treatment. I.D. at 71. Had Fiser been treated in the same way, TVA has provided no basis to conclude that, as the chemist with most seniority, he would not have retained his position

TVA also asserts that McGrath had no knowledge of Fiser's 1993 DOL complaint or the Sasser letter. The Board found otherwise based on credibility determinations. I.D. at 25. It is apparently TVA's belief, that as long as McGrath denies such knowledge his denial must be credited.

TVA asserts that the Board's decision was "erroneous as a matter of law" when it found a temporal proximity between the filing of Fiser's 1996 DOL Complaint and his non-selection for a position.[4] TVA Petition at 5 ¶ 6. TVA alleges that the decisions to reorganize, to rewrite position

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[4] TVA and NEI have also argued throughout this proceeding that it was improper for the Staff to rely on the temporal proximity between McGrath and McArthur becoming Fiser's management and his exit from TVA. See TVA Findings of Fact and Conclusions of Law at (continued...)

descriptions and to post the chemistry position were all made prior to Fiser filing his complaint. *Id.* This is a *non sequitur.* Fiser told TVA that he would file a complaint if the positions were posted, and more importantly, the selection of the SRB, the questions propounded, the failure to comply with mandatory TVA selection procedures and Kent's poisoning of the well all occurred after the filing of his complaint. Staff FOF at 41-42 ¶¶ 2.124-2.127. Thus, although some decisions may have been made before Fiser filed his complaint, the record establishes that many other outcome-determinative decisions occurred subsequent to the filing of his complaint. Therefore, the Board's finding is hardly "erroneous as a matter of law".

TVA also claims that the Board erred in finding that the makeup of the SRB and the questions asked by the SRB amounted to a virtual preselection of Harvey when it also found that the Staff did not prove that Harvey was preselected. TVA Petition at 4 ¶ 5. However, this is not what the Board held. It stated that the evidence pertaining to the telephone calls between Harvey and Voeller during the time that SRB member Kent was trying to get Harvey transferred to SQN and that transfer was blocked by McGrath were non-conclusive on the issue of preselection. I.D. at 58-59. The Board then went on to hold that the makeup of the SRB, the questions asked and the determination that McArthur would be the selecting official amounted to a virtual preselection of Harvey -- a finding in no way contradictory to its earlier conclusion regarding the attempts to transfer Harvey. I.D. at 58.

TVA further argues that discrimination played no part in Fiser's nonselection. TVA states that the Board did not even address the persuasiveness of the statistical analysis it submitted in spite of the fact that a member of the majority went so far as to state "I find no flaws in your

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[4](...continued)
125-128. They have said that the interactions between McGrath, McArthur and Fiser in the early 1990's were too far removed to have had any bearing on the 1996 reorganization. Curiously, however, they readily accept Judge Young's separate opinion, which is based entirely on interactions and performance occurring in the early 1990's. I.D. at 77-78.

statistics." TVA Initial Brief at 16. TVA has taken this statement out of context. The statement was clearly intended to cover only the mechanics of the analysis -- not its conclusions. The Board member went on to point out that the analysis could also find that green hair or any other variable that one plugged into the analysis would result in a similar conclusion. Tr. 4615. As established in the record, and admitted by TVA's expert, the ratings given Fiser by the two SRB members with knowledge of his protected activities were outcome-determinative. Had the third SRB member given Fiser the maximum of 10 points on each question, he would still have come out in third place. Staff FOF at 111-113 ¶¶ 3.69-3.74. Thus, the Board did not err in failing to mention the meaningless analysis performed by TVA's statistician.

TVA and NEI have also argued with respect to this selection that the Staff has never suggested that the most qualified individual was not the selectee. TVA Initial Brief at 16,24; NEI Brief at 14, n.7. The Staff takes issue with these assertions. The Staff introduced evidence, that from 1994 through the time of the selection, Fiser received better performance appraisals than Harvey(Tr. 528), that Grover -- Harvey and Fiser's supervisor -- testified that he would have selected Fiser (Tr. 1932), and that Harvey had significant conduct related problems which were ignored during the selection process. Staff FOF at 62-65 ¶¶ 2.178-2.185. The evidence indicates that in fact Fiser was the better qualified for the position.

Therefore, the Commission should find that TVA, by merely repackaging the same arguments made to and rejected by the Board and misrepresenting the record, has not met the "clearly erroneous" standard.

II. TVA's Failure To Follow Mandatory RIF Regulations Was Also An Adverse Action Against Fiser

TVA places a great deal of emphasis on its claim that Fiser was treated fairly in the competitive selection process for the PWR Chemistry Program Manager position which resulted from the 1996 TVA reorganization. As the Board correctly found, I.D. at 53-58, this was not the

case. However, it is important to note that this flawed selection was not the only adverse action visited upon Fiser. TVA's intentional failure to follow the requirements applicable to reductions set forth in OPM RIF regulations, as well as TVA's own procedures applicable to reductions, resulted in the first adverse action against Fiser.

Fiser had seniority over Harvey and Chandrasekaran ("Chandra"), the other chemists occupying the same position as Fiser, and would have been retained in his position if TVA had not made an end run around its own procedures and OPM regulations. I.D. at 50.

In 1994 Fiser was placed in a PG-8 position as a Chemistry Program Manager in TVA's Operations Support organization in settlement of his 1993 DOL complaint. I.D. at 26-27. In 1994, a reorganization occurred and Fiser was selected for the position of Chemistry and Environmental Program Manager. I.D. 28.

In 1996, the Operations Support organization underwent reductions as part of a reorganization. During this reorganization, TVA made a number of decisions and took a number of actions which were adverse to Fiser. First, McGrath decided that the Chemistry organization should undergo the entire 40 percent reduction in the first year of the five year reorganization plan, which mandated that one of the three PG-8 Chemistry Managers would lose his position in the organization. Tr. p. 1860, l. 12.

McGrath also decided that the remaining two positions should be specialized positions, one for PWR Chemistry and one for BWR Chemistry. Tr. p. 453, l. 17; p. 1699, l. 15; p. 1863, l. 10. The two Chemistry Manager positions were then determined to be significantly different from the Chemistry and Environmental Protection Program Manager positions the incumbents held, and were therefore posted for competition. Tr. p. 1217, l. 1.

TVA has a Personnel Manual Instruction which sets forth the procedures for conducting a RIF, including how to make a competitive level determination. Jt. Exh. 65. In order for two positions to be in the same competitive level, they must be interchangeable, meaning the

"incumbent of one job must be able to perform satisfactorily the duties of the interchangeable job and vice versa." Jt. Exh. 65 at 14. The determination of interchangeability is made considering the qualifications set forth in the official position description, the duties of the position, and the standards for fully adequate performance of the position. *Id.* Additionally, the policy requires that these determinations be made "solely on the content of *accurate, up-to-date* job descriptions." *Id.* at 15 (emphasis added).

Fiser's supervisor, Grover, testified that in 1994, the Chemistry and Environmental functions were combined into a single position description because the organization wanted to cross-train the employees in those positions. Tr. p. 1826, l. 25. However, this cross-training was never implemented, and 95 percent of the duties the three PG-8 Chemistry and Environmental Protection Program Managers continued to perform related to chemistry. Tr. p. 1885, l. 22. Fiser, Harvey, and the three site RadChem Managers all confirmed that the three incumbents did not perform environmental duties in the period leading up to the 1996 reorganization. Tr. p. 2311, l. 13; p. 5036, l. 19; p. 2841, l. 18; p. 1750, l. 2; p. 3066, l. 7. Therefore, the position descriptions used to make the determination as to whether the new Chemistry Program Manager positions were interchangeable with the Chemistry and Environmental Protection Program Manager positions were neither accurate nor up-to-date. Had TVA used accurate position descriptions, it would have been required to follow OPM and TVA RIF procedures, and Fiser would have retained his position. I.D. at 51.

Moreover, McGrath could have reduced the organization to two PG-8 Chemistry and Environmental Protection Program Manager positions and accomplished the same results. However, since Fiser had seniority on the retention register and would have been retained in such a situation, it was necessary for McGrath to manufacture different position descriptions in order to eliminate Fiser. *See* TVA Exh. 93, p. EH000033.

Therefore, it is clear that TVA's failure to follow both its own and OPM's procedures resulted in an adverse action against Fiser. Had TVA followed those procedures, there would never have been the subsequent competitive selection.

III. The Commission Should Reject The Narrow Definition Of Protected Activity Urged By TVA, NEI And The Dissenting Board Member

TVA, NEI and the dissenting Board member have all embraced adoption of an extremely narrow view of what constitutes "protected activity" within the meaning of Section 50.7 and Section 211. The Staff submits that adoption of such a restricted interpretation is at odds with the language and purpose of the provisions -- and with appropriate precedent.

A. A Narrow Scope Is At Odds With Section 211 and Section 50.7

The position of TVA and NEI appears to be that protected activity only encompasses the initial finding and documenting of issues against the wishes of licensee management. Follow up activities are not protected. TVA Initial Brief at 24-26; NEI Initial Brief at 16-17. Similarly, in espousing a very constricted view of what is encompassed within the ambit of protected activity, Judge Young, without regard for the language of both Section 211 and Section 50.7, appears to adopt Justice Potter Stewart's oft quoted statement on pornography: "I know it when I see it." *Jacobellius v. Ohio*, 378 U.S. 184, 197 (1964). I.D. at 72. Neither the language of Section 50.7 nor Section 211 requires that an individual be the first one to find, raise, report or document a safety issue.[5] Section 50.7(a)(1)(iv) specifically covers "assisting" others who engage in protected activity as well as any "participation" in protected activities.

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[5] In point of fact, neither the statutory provision nor the Commission's regulation mention the word "safety." Rather, both provisions cover perceived violations of statutory or regulatory provisions and any requirements thereunder. All NRC regulatory requirements can be said to encompass safety as they are adopted to protect the public health and safety or the common defense and security. However, there are many requirements, both substantive and procedural, whose violation would not normally invoke the mantel of safety issue. Protected activities concerning those requirements are nonetheless covered by Section 211 and Section 50.7.

TVA is well aware, having long ago raised and lost the issue, that there is no requirement that a whistleblower be the first one to raise an issue or that it be an issue that the employer is trying to cover up.

> It has been suggested by TVA that DeFord should be required to show that he disclosed unique evidence to the NRC, or evidence that TVA attempted to hide, in order to make out a case. This contention is expressly rejected. The purpose of the Act is to prevent employers from discouraging cooperation with NRC investigators, and not merely to prevent employers from inhibiting disclosure of particular facts or types of information. Under this antidiscriminatory provision, as under the NLRA, the need for broad construction of the statutory purpose can be well characterized as "necessary 'to prevent the [investigating agency's] channels of information from being dried up by employer intimidation,'" (Citations omitted), and the need to protect an employee who participates in agency investigations clearly exists even though "his contribution might be merely cumulative," (citations omitted).

DeFord v. Secretary of Labor and Tennessee Valley Authority,700 F.2d 281, 286 (6th Cir.1983).

Similarly, DOL has held that:

> It is not necessary, in order for an employee's action to be considered protected under the ERA whistleblower provision, for that action to have a direct effect upon nuclear safety. Thus, for example, it matters not that an employee complains about a hazard that has already been corrected, or complains to the NRC about a condition that the employer is already aware of. The complaint may still be considered protected activity. . . . .If Centerior's theory were correct, an employer who had created a nuclear hazard and had been cited for it by the NRC, could retaliate against an employee who belatedly reported that violation to the NRC. The language of Section 211 does not require such a far-fetched result.

McCafferty et al. v. Centerior Energy, 96-ERA-6 at 3 (ARB October 16, 1996). The dissent and TVA/NEI would reach a similarly untenable result in this case. If three employees signed a letter to the NRC reporting perceived violations which only one of the three had actually discovered, raised and/or documented, under their view of the law, the employer would be free to fire the other

two for signing the letter because they had not engaged in protected activity of the type that would support a nexus between that activity and an adverse action.[6]

B. Fiser Engaged In Protected Activities Beyond His DOL Complaints And The Sasser Letter

Both the majority and dissent seem to emphasize the need for the protected activities to include a "technical" issue, beyond filing complaints or writing letters, to establish the legitimacy of Fiser as a whistleblower. I.D. at 35, 37. As will be discussed below, Fiser did in fact engage in technical whistleblowing. However, it is important to stress that no such requirement exists. If an individual is not selected for a position because they filed a DOL complaint, it is a clear violation without regard to anything else -- technical or otherwise. 10 C.F.R § 50.7(a)(1)(iv - v).

Having said that, it is clear that Fiser did in fact engage in finding and/or pursuing technical concerns. One prime example involves the diesel generator fuel oil issue, and it highlights perhaps the most perplexing area of the dissent's position on protected activities. Contrary to supporting praise of TVA, the record on this issue clearly indicates otherwise as fully set forth in the Staff FOF at 31-33 ¶¶ 2.94 -2.98. In summary, in 1988 prior to the restart of SQN, the Chemistry Program conducted a bottom up review of all surveillance instructions, including those related to the sampling of the diesel generator fuel oil. This review failed to identify a significant problem which subsequently resulted in the four emergency diesel generators being declared inoperable because the fuel oil had not been sampled in accordance with SQN's Technical Specifications. This resulted in SQN entering a Limiting Condition for Operation ("LCO") in which it had 24 hours to complete the required sampling or shut down.

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[6] See the discussion in the dissent concerning the Sasser letter. I.D. at 77. Additionally, The Staff does not agree with TVA and Judge Young's characterization that Fiser had nothing to do with any of the issues set forth in that letter. Fiser participated with Jocher in raising and pursuing several of the issues, and as discussed below was heavily involved in the diesel generator fuel oil issue. Staff FOF at 15 ¶ 2.41; 36 ¶ 2.109.

David Goetcheus was the Chemistry Superintendent at the time of the surveillance instruction review. Fiser succeeded Goetcheus in that position and was the Event Manager responsible for reviewing a potential problem, which as Judge Young notes, was identified by others. I.D. at 73-74. However, during the course of that review, Fiser and his team discovered that not only did the sampling procedure fail to meet the ASTM standard -- the original problem being reviewed -- but the design of the tanks themselves was an additional and considerably more significant problem. Instead of a single tank as was thought to be the case, it turned out that there were four tanks connected by a single header and the recirculation pump only recirculated fuel oil in portions of the two center tanks. This was the problem that Fiser and his staff were responsible for finding, documenting and correcting, and it was a different problem than the one he was assigned to review. It was this problem that led to the LCO and threats to discipline Fiser, and it was this problem that Goetcheus missed prior to restart when it could have been corrected without entry into an LCO.[7] This was unquestionably protected activity on Fiser's part, and demonstrates that it was the *discovery and documentation* of this safety problem that upset TVA – not the poor performance of the manager responsible for the failure that led to the LCO. Therefore, the Commission should conclude that Fiser's activities with respect to the diesel fuel oil tanks were protected.

In addition, and most significantly, the Staff has maintained throughout this proceeding that Fiser's problems began in earnest when he failed to agree to a demand made by McGrath in 1992 at an Nuclear Safety Review Board ("NSRB") meeting. On this the majority and dissent appear to agree. I.D. at 46-47, 78. TVA has argued that Fiser's refusal was an act of insubordination not protected activity. I.D. at 46. A quick review of the facts which are detailed in the Staff FOF at at 34-36 ¶¶ 2.101-2.108, proves otherwise. During a period in which Fiser was detailed to Outage

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[7] Goetcheus did not even know that this problem existed until the day before his testimony in this case -- 15 years after the fact.

Management, trending data was not being recorded for a period of time due to computer problems. Upon his return, Fiser corrected the problem, and the trending was again being done. Subsequently, after the problem was fixed, McGrath – who was not Fiser's supervisor or even in his chain of command – demanded at an NSRB subcommittee meeting that Fiser adopt a procedure that would mandate that full and complete chemistry trending be performed each and every day – weekends and holidays included. Fiser refused to agree to adopt such as procedure because he did not have the resources to guarantee that the data could be collected and recorded every day and because the computer they had was of questionable reliability. Fiser indicated that adoption of such a procedure which could not be met would result in more NRC violations for failure to comply with procedures -- a recurring problem at TVA. Staff FOF 34-35 ¶ 2.103. His refusal to adopt a procedure which would lead directly to violations was protected activity under Section 50.7(a)(1)(ii). NEI asserts that his belief was speculative. However, all that is required is a good faith belief on Fiser's part that a violation would occur, and he was in the best position to judge the ability of his staff and equipment to comply with a mandatory procedure.

It is important to emphasize that Fiser was not insubordinate, and that the same trending that was being done before the NSRB meeting continued to be done after the NSRB meeting and even after Fiser left the site – without significant change. I.D. at 44-45. Fiser's management never ordered any change and none occurred other than Fiser's transfer to TVA headquarters not long after the incident and his improper RIF in 1993. The evidence established that McGrath was angry and that this set in motion actions which twice led to Fiser's RIF. Staff FOF at 36 ¶¶ 2.107-2.108.

In sum, the Staff believes that the Commission should determine that a refusal to engage in an activity which an employee in good faith believes would result in a violation is protected activity.

IV. The Commission Should Adopt The "Contributing Factor" Standard Articulated In Section 211 Of The Energy Reorganization Act

The Staff has maintained throughout this proceeding that the standard Congress adopted in Section 211 – "contributing factor" – is the correct standard to apply in cases arising under Section 50.7. See Section 211(b)(2)(C).

As was fully developed by the Staff in its Pretrial Legal Brief,[8] the Commission was involved in whistleblower protection efforts under its inherent authority derived from the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2011 *et seq.*, ("AEA") long before Congress provided personal remedies for victims of whistleblower discrimination in Section 210 – now 211. Congress specifically indicated in adopting Section 210 that it was not in anyway limiting the NRC's continued authority to take action against licensees who discriminate. The Commission cited both the AEA and the ERA in adopting Section 50.7. 47 Fed. Reg. 30,452 (July 14, 1982). Given that the Commission's authority predates DOL's and that DOL's authority complements that of the Commission, the Commission is under no requirement to defer to DOL in this area. However, as this is the first case arising under Section 50.7, and as Section 50.7 was adopted in part under the authority of Section 211, it is appropriate for the Commission to look to Section 211 for guidance regarding the standard which should be applied in adjudications arising under Section 50.7. To do otherwise could lead to the Commission and DOL arriving at conflicting positions on the same set of facts. Such a result could have an adverse effect on public confidence.[9]

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[8] NRC Staff Pretrial Legal Brief, March 1, 2002 at 2-6.

[9] TVA and NEI have argued throughout this proceeding that Section 211 and DOL interpretations thereof should be binding on the Commission. TVA appears to still be taking that position. NEI, on the other hand, now appears to be suggesting that the Commission ignore Section 211 and DOL case law and instead develop an interpretation based on NEI's view of Section 50.7(d). NEI Amicus Brief at 5. NEI seemingly argues that the Commission should base its determination on the state of the law under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, as it existed prior to its amendment in 1991 and prior to the 1992 amendments to the ERA. NEI Amicus Brief at 12-13. This is an untenable position.

The standard is set forth in Section 211(b)(3)(C) which states as follows:

> The Secretary may determine that a violation of subsection (a) has occurred only if the complainant has demonstrated that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) was a contributing factor in the unfavorable personnel action alleged in the complaint.

Thus, for a violation of Section 211 to be found, it must be established that protected activity was a contributing factor in an adverse action.[10] The Commission should apply the same standard to cases arising under Section 50.7.

TVA and NEI have argued[11] previously that the Commission should also look to the standard applied by DOL in determining whether a personal remedy should be granted to the whistleblower for proven discrimination. This standard is set forth in Section 211(b)(3)(D):

> Relief may not be ordered under paragraph (2) if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.

Since the Commission is not granting relief to whistleblowers but rather is taking action to ensure that individuals feel free to raise issues and otherwise engage in protected activities without fear of reprisal, the standard for granting personal remedies is inapposite to adjudications arising under Section 50.7.[12] The Commission should so hold and clearly state that unfavorable consideration of protected activity is proscribed – period.

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[10] A recent DOL decision, *Kester v. Carolina Power and Light Company*, 00-ERA-31 (ARB, Sept. 30, 2003) indicates that in amending the ERA in 1992 Congress intended the "contributing factor'" standard to be less onerous than the "motivating factor" standard which had been utilized prior to the amendments. Id. at 7, n.15.

[11] It's not clear whether or not TVA is still taking this position, but NEI clearly is. See NEI Amicus Brief at 13.

[12] *Kester, supra*, at 12, makes clear that the determination of a violation is separate from the determination to grant a remedy for that violation.

A. The Commission Should Look To DOL And Other Discrimination Decisions As An Appropriate Source For Guidance In Applying The Contributing Factor Standard To Cases Arising Under Section 50.7

The operative language of the whistleblower protection statutes is similar to the language of Title VII, and therefore, DOL has generally followed the case law developed by the Supreme Court under Title VII and other anti-discrimination statutes when adjudicating cases arising under Section 211. The Staff believes that the Commission should do likewise and look to Supreme Court and other relevant case law under Title VII and other anti-discrimination statutes when analyzing a violation of Section 50.7. The Supreme Court and DOL have both recognized two methods of proving discrimination in employment discrimination and whistleblower retaliation cases -- proof by circumstantial evidence and proof by direct evidence.

Because a complainant often lacks direct evidence of discrimination, the Supreme Court has adopted a burden shifting method of proving discrimination based on circumstantial evidence. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Under the *McDonnell Douglas/Burdine* construct, as applied by DOL to whistleblower discrimination cases, the complainant must initially establish a prima facie case of discrimination by showing: 1) that the complainant engaged in protected activity; 2) that the employer took an adverse action against the complainant; 3) that the decision makers had knowledge of the complainant's protected activity; and 4) that there is a nexus between the complainant's protected activity and the adverse action. *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 933-34 (11th Cir. 1995); *Dartey v. Zack Company of Chicago* , 82-ERA-2 (Sec'y Apr. 25, 1983). *See also Larry v. Detroit Edison Co.*, 86-ERA-32 (Sec'y June 28, 1991) and *Overall v. Tennessee Valley Authority*, 97-ERA-53 (ARB Apr. 30, 2001).

Once a prima facie case of discrimination has been established, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse action. This is a burden of production, not of persuasion. *Burdine*, 450 U.S. at 254-55. The employer's burden is

satisfied if it explains what it did or produces evidence of a legitimate, nondiscriminatory reason for its action. *Id.* at 256. In the context of a section 50.7 case, once the employer meets this burden, the Staff must establish that the reason proffered by the employer is a pretext for discrimination. The Staff may satisfy this burden by producing evidence that a discriminatory reason motivated the employer to take the adverse action or by demonstrating that the proffered reason was false. *Id.*, and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000).

Reeves is a very significant case in the discrimination arena. Earlier, in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), the Court stated, as quoted by the dissent, that, "[i]t is not enough, . . . to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." *Id.* at 519 (emphasis in original), I.D. at 80. The Court also said, "a reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *Id.* at 515 (emphasis in original). This latter quote was responsible for many courts and DOL adopting a "pretext plus" standard.[13] Under this standard a plaintiff was required to introduce direct evidence of discriminatory intent in addition to demonstrating that the employer's articulated reason was not credible.

However, in *Reeves*, following the preceding quote, the Court continued:

> In reaching this conclusion, however, we reasoned that it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation. Specifically we stated:
>
> 'The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.' (Citation omitted).
>
> * * *

[13] See *e.g.*, *Overall, supra*, at 12 noting that *Reeves* rejected the "so-called 'pretext plus' rule."

> In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.' (Citations omitted.)

Id. (Emphasis in original). Thus, the Court clarified that a plaintiff can establish discrimination by proving the elements of a prima facie case and that the reason proffered by the employer is not credible.[14] As TVA is well aware, there is no requirement that, in addition to the above, a plaintiff must introduce direct evidence of discriminatory motive. In *Overall, supra*, DOL's Administrative Review Board stated:

> TVA argues that the record is devoid of any direct evidence attributing illicit motivation to any of TVA's management. Discrimination complaints legitimately may be grounded on circumstantial (indirect) evidence of retaliatory intent, however. (Citations omitted).
>
> * * *
>
> A complainant may prevail under the pretext model when the complaint consists exclusively of a prima facie case of discrimination and evidence sufficient for a reasonable adjudicator to disbelieve or reject the respondent's legitimate nondiscriminatory reason for its adverse action. This combination of evidence thus may sustain a finding of liability for intentional discrimination.

Id. at 12.

Of course, it is always permissible to prove a discrimination case without resort to the shifting burdens of proof set forth in *McDonnell Douglas/Burdine/Reeves.* See *Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985) in which the Court stated that "the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination." DOL has also noted that a complainant is not required to establish a prima facie case of discrimination when he introduces direct evidence of discrimination. *See, e.g., Blake v. Hatfield Electric Co.*, 87-ERA-4 (Sec'y Jan. 22, 1992). Direct evidence of discrimination can include statements by the employer

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[14] Almost all of the cases cited by TVA, NEI and the dissent predate the decision in *Reeves.*

that it took the complainant's protected activity into account when making a decision or that the employer made negative statements about the complainant's protected activity. *See Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564, 1568 (2d Cir. 1989). *See also Talbert v. Washington Public Power Supply System*, 93-ERA-35 (ARB Sept. 27, 1996).[15] Once a complainant establishes through direct evidence that his protected activity was a contributing factor in an adverse employment decision, he has met his burden of proof and established a violation of the relevant anti-discrimination statute.

As noted by the Commission, Order at 3, TVA has alleged that direct evidence is required in order to prevail in a discrimination case. However, as both TVA and NEI are aware, the Supreme Court has definitively held otherwise. *Desert Palace Inc. v. Costa*, 123 S. Ct. 2148 (2003).[16] In *Desert Palace*, the Court said in confronting the question: "We hold that direct evidence is not required." 123 S.Ct. at 2150. Thus, DOL's rejection of TVA's argument to the contrary in *Overall* was correct.

B. Section 50.9 Requires That Licensees Completely And Accurately Disclose All Reasons For Adverse Actions Taken Against Whistleblowers

In accordance with 10 C.F.R. § 50.9 (a), information "provided to the Commission by . . . a licensee . . . shall be complete and accurate in all material respects." TVA's Corporate Licensing Manager, Mark Burzynski, testified that he understood that Section 50.9 applied to the Predecisional Enforcement Conference in this case, and that TVA was required to disclose to the Staff any and all reasons for the actions they took against Fiser. Tr. 4944-4945. Thus, the

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[15] Contrary to the representations made by TVA, the ARB held in *Kester* that *Talbert* does not stand for the proposition that direct evidence is required in discrimination cases. See *Kester, supra*, at 8, n.19.

[16] TVA cites to the Court of Appeals decision in *Desert Palace,* TVA Initial Brief at 19, 22, and NEI cites to the Supreme Court decision, NEI Amicus Brief at 13 n.5. NEI claims that the holding in *Desert Palace* is inapposite to the present case because it post-dates the 1991 amendments to Title VII.

previously discussed language of *St. Mary's* which has been quoted by TVA, NEI and the dissent to the effect that proof that the reasons proffered by TVA are not credible does not mean that there are not other reasons which they just did not choose to share[17] has no application in a case arising under Section 50.7. Licensees are not free to withhold the "real reason," and thus, it was improper for both the majority and dissent to conclude that Fiser's performance from 1988 to 1992 was one of the bases for the adverse actions against Fiser when TVA has repeatedly stated that his performance played no part in those decisions. Tr. 2476, 4388, 4392.

C. Proof By The Staff That The Reasons Put Forth By The Licensee Were Not Credible Is Sufficient To Compel A Finding Of Discrimination

As was discussed at length above, the Supreme Court has now clarified that proof by a complainant that the reasons proffered by an employer are not credible is sufficient when coupled with the evidence which established the prima facie case to find that discrimination occurred. DOL has specifically held that proof that the employer's reasons are not credible is sufficient to compel a finding of discrimination. *Overall, supra*, at 22.

The Staff submits that because licensees are required under Section 50.9 to disclose any and all reasons for the actions which they took, in a case arising under Section 50.7, if a prima facie case is made and the Staff establishes that the reasons then proffered by a licensee are not credible, the Board must find that discrimination occurred. Therefore, since the Board found that the reasons proffered by TVA were not credible[18], the Staff is entitled to a finding that TVA discriminated against Fiser.

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[17] In fact, contrary to the dissent, there was no testimony that Fiser was discriminated against because of "inept management practices and actions, personality clashes, personal dislike and hostility, and related grounds." I.D. at 80.

[18] TVA's asserted reasons for the actions against Fiser is that they were mandated by TVA and OPM procedures. The Board found otherwise. I.D. at 50-53.

D. Section 50.7(d) Is Not Inconsistent With The Standard Set Forth In Section 211

TVA and NEI have placed a great deal of reliance on 10 C.F.R. § 50.7(d). The Staff maintains that Section 50.7(d) in no way changes any of the burdens or standards previously discussed nor does it alter the outcome in this case. In fact, it appears that both NEI and TVA are still arguing in favor of the "contributing factor" standard – although it is not clear what NEI's position is. Section 50.7(d) states in its entirety:

> Actions taken by an employer, or others, which adversely affect an employee may be predicated upon non-discriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An employees engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse actions dictated by non-prohibited considerations.

The meaning of the section is self-evident – engaging in protected activity does not immunized an employee from adverse actions which are not predicated on that protected activity. The section recognizes the right of licensees to take actions against whistleblowers as long as they do not rely on protected activities to take the actions. To the extent that TVA or NEI is suggesting that, as long as protected activity is not the only reason for the adverse action, then Section 50.7(d) says it is okay to discriminate a little bit, the regulation will not support that interpretation. The first sentence only protects actions predicated on entirely non-discriminatory grounds. It does not say adverse actions can be predicated on some legitimate, non-discriminatory reasons as well as some discriminatory reasons. Thus, reference to Section 50.7(d) has no affect on the outcome of this proceeding or the burdens and standards which the Commission should adopt for application to cases arising under Section 50.7.

E. The Motive Of A Whistleblower For Engaging In Protected Activity Is Irrelevant In A Discrimination Case

The Board majority indicated that it looked to determine whether Fiser had actively engaged in protected activities involving technical issues to remove any inference that he was "working the system." I.D. at 35. The dissent placed great weight on the conclusion that the Staff had failed to prove that Fiser was not working the system to attain personal advantage. I.D. at 75-76. Consideration of Fiser's motives in filing complaints and writing letters and pursuing issues or assisting others in their pursuit of issues was improper as it is well established that a whistleblower's motive for engaging in protected activity is irrelevant -- as even a cursory review of relevant decisions would have revealed. The Staff did not attempt to establish Fiser's motives nor did it brief the issue previously because it was unaware that Judge Young's view of what constitutes real whistleblowing was improperly motive dependent.

In *Gibson v. Arizona Public Service Company*, 90-ERA-53 (Sec'y Sept. 18, 1995), the Secretary of Labor stated clearly and unequivocally, "the ERA prohibits retaliation based on protected activity regardless of the whistleblower's motives." *Id.* at 4. Likewise, in *Diaz-Robainas v. Florida Power & Light*, 92-ERA-10 (Sec'y Jan. 19, 1996), it was stated that "where the complainant has a reasonable belief that the respondent is violating the law, other motives he may have for engaging in protected activity are irrelevant." *Id.* at 6.

Similarly, and pertinent to TVA's allegations in this case, in *MacLeod v. Los Alamos National Laboratory*, 94-CAA-18 (ARB Apr. 23, 1997),[19] the Administrative Review Board reversed an ALJ decision based on a finding that the complainant's motive for engaging in protected activity was to avoid responsibility for her own mistakes and held that motive is irrelevant in determining whether the activity was protected. *Id.* at 7.

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[19] *MacLeod* was erroneously docketed as a Clean Air Act case but is actually an ERA case. *Id.* at 9, n. 2.

Similarly, in *Carter v. Electrical District No. 2 of Pinal County,* 92-TSC-11 (Sec'y July 26, 1995), the Administrative Review Board, acting on behalf of the Secretary, stated that the purpose of whistleblower statutes is to encourage employees to come forward with complaints of health hazards so they can be remedied. "If such a course of action furthers the employee's own selfish agenda, so be it." *Id.* at 11. Other motives of an employee are irrelevant. *Id.* See also, *Oliver v. Hydro-Vac Services, Inc.*, 91-SWD-1 (Sec'y Nov. 1, 1995).

TVA presented no evidence in which it was even suggested that the issues covered in Fiser's various complaints, letters and other protected activities did not evidence potential regulatory violations. The only question appears to be whether he was the first on his block to raise the various issues. As was established, that is also an irrelevant question. Thus, the Commission should determine that a whistleblower's motives for engaging in protected activity are irrelevant. If the purpose of Section 50.7 is to encourage employees to come forward with issues, it is counterproductive to insist that they do it for only the "right" reasons.

F. The Commission Should Adopt The Same Prophylactic Rule Against Disclosure Of Protected Activity As Has Been Applied By DOL In Section 211 Cases

In *Earwood v. Dart Container Corp.*, 93-STA-0016 (Sec'y Dec. 7, 1994), a case arising under the whistleblower protection provisions of the Surface Transportation Act of 1992, the Secretary of Labor concluded that "effective enforcement of the Act requires a prophylactic rule prohibiting improper references to an employee's protected activity whether or not the employee has suffered damages or loss of employment as a result." *Id.* at 3. The Secretary specifically rejected the employer's argument that *Smith v. Tennessee Valley Authority*, 90-ERA-12 (Sec'y Apr. 30, 1992), a case arising under Section 211, required a complainant to prove that the reference resulted in some loss of employment opportunity.

Subsequently, in *Gaballa v. The Atlantic Group*, 94-ERA-9 (Sec'y Jan. 18, 1996), the Secretary reaffirmed *Earwood* and applied it directly to Section 211. The Secretary concluded that

"discriminatory referencing violates the ERA regardless of the recipient of the information." *Id.* at 2. The Secretary referenced both *Earwood* and *Gaballa* in noting that "an employer's reference to participation in protected activity in the course of providing an employment reference violates the ERA." *Remusat v. Bartlett Nuclear Inc.*, 94-ERA-36 (Sec'y Feb 26, 1996) at 5.

TVA and NEI have stated repeatedly that DOL is the appropriate source for interpretations of Section 50.7, and the Staff agrees that it is an appropriate source. Applying this prophylactic rule to the present case, the Commission should determine that the statement of Charles Kent immediately prior to the SRB for the PWR chemistry position, in the presence of at least one other SRB member, that Fiser had filed a DOL complaint was entirely inappropriate and alone would support a violation. TVA apparently believes that Kent's actions were appropriate in order to assure that TVA's procedures were correctly followed. I.D. at 79; TVA Petition at 4 ¶ 3; TVA Initial Brief at 15. This is a specious argument premised apparently on the fact that without a heads-up, TVA would not follow its required procedures. While the record is replete with examples in which that was no doubt true – including the selection at issue – the Commission should not countenance identification of an employee as a "whistleblower" prior to a competitive selection.[20]

Furthermore, neither McGrath nor McArthur nor any other TVA witness could name a single TVA employee who filed a DOL complaint and was subsequently selected for a promotion. The Staff established, and the Board found (I.D. at 33-35 and 81) that an environment unfavorable to whistleblowers existed in the chemistry group at TVA during the time in question, and this makes it clear that highlighting Fiser's protected activity was adverse to his interests.

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[20] Kent also indicated that because he knew McArthur was involved in Fiser's 1993 and 1996 complaints, he wanted to suggest that McArthur not be involved in the SRB's questioning. Tr. 3154-3155. This is also a meaningless reason given that McArthur wrote the questions that would be asked and was still going to be the selecting official.

V. TVA's Claim That It Was Denied Fair Notice And Due Process Is Baseless

TVA claims that the Board violated procedural due process by considering issues not specifically raised in the notice of violation (NOV). TVA Initial Brief at 39-40. In support of this argument, TVA cites several cases. These cases make clear that a federal agency cannot argue on appeal that its decision should be upheld on a basis that was never mentioned in that decision. The cases also make clear that an agency cannot decide a case on a basis that was not raised and litigated during the proceeding. However, neither of these situations exist in the present case, and the cited cases do not support a finding that the Board's decision violated TVA's due process rights.

First, TVA points out that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." TVA Initial Brief at 39, quoting *SEC v. Chenery*, 318 U.S. 80, 87 (1942). TVA then goes on to conclude that *Chenery* "mandates" that in determining whether to uphold the imposition of penalties, the Board may consider only those allegations that were raised in the NOV. *Id.* A careful reading of *Chenery*, however, does not support TVA's assertion. *Chenery* dealt with judicial review of a final agency action. The order issued in this case was not a final agency action and will not be one unless and until it is upheld by the Commission. Where a federal court reviews a final agency action, the standard of review is quite deferential. The court may not intrude upon the domain which Congress has entrusted to an administrative agency, *Chenery*, 318 U.S. at 89, and as noted by TVA, must judge the final action on the grounds on which it was based. However, this is not the case when the Board is reviewing a Staff enforcement decision. The Board reviews the evidence *de novo*. To provide the very opportunity for hearing that TVA demanded, the Board must review all the evidence and make its own determinations. Thus, *Chenery* is not applicable to the present case and does not support TVA's due process claim.

TVA also argues that "to satisfy the requirements of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case." TVA Initial Brief at 40, quoting *Yellow Freight, Inc. v. Martin*, 954 F.2d 353 (6th Cir. 1992). TVA is correct in its assertion. TVA also seems to believe that this statement of the theory must be found in the NOV. In fact, the cases cited support the opposite conclusion -- specifically, that due process requires only that TVA have notice of the theory at a time when it can still defend against the theory. In *Yellow Freight*, the Sixth Circuit Court of Appeals held that the Secretary of Labor had violated the procedural due process rights of a motor freight carrier by finding that the carrier had violated a statutory provision that was not mentioned in the notice to the carrier and that was not tried during the hearing. Citing *Yellow Freight*, TVA notes that "an agency may not change theories in midstream without reasonable notice." TVA Initial Brief at 40. However, the court goes on to clarify that,

> [n]otwithstanding the possible lack of notice prior to the administrative hearing, due process is not offended if an agency decides an issue the parties fairly and fully litigated at a hearing. When parties fully litigate an issue they obviously have notice of the issue and have been give an opportunity to respond.

Yellow Freight at 358. Thus, while an agency must give notice of the theory on which it is proceeding, that notice need only be sufficient to provide a real opportunity to be heard. TVA fails to address this prong of the court's analysis. TVA does not claim that the bases on which the Board relied were not litigated, only that they were not included in the NOV. In fact, the issues TVA objects to were fully litigated, and thus were a proper basis for the Board's decision, regardless of whether they were raised in the NOV.

TVA also relies on *Bendix Corporation v. Federal Trade Commission,* 450 F.2d 534 (6th Cir. 1971) to support its argument that the Board decision violates due process. The holding and facts of *Bendix* are similar to those of *Yellow Freight*, and like *Yellow Freight, Bendix* does not support TVA's claims. In *Bendix*, the Sixth Circuit Court of Appeals overturned a decision of the

FTC because it was decided on "a theory of illegality which was never charged, raised, nor tried during the administrative hearing; never presented for consideration by the Hearing Examiner; and not raised as an issue or discussed by Complaint Counsel in the appeal to the Commission from the order of the Hearing Examiner dismissing the complaint." *Bendix* at 537. In contrast, the two items that TVA objects to, the 1996 DOL complaint and the Sasser letter, were raised numerous times before and during the hearing. They were addressed both by the Staff and by TVA in pre-hearing filings and during the hearing. They were discussed in the Board's decision. TVA has no basis for claiming that it did not have notice that the Staff was relying, at least in part, on the 1996 complaint and the Sasser letter.

Finally, the present case differs from both *Bendix* and *Yellow Freight* in another significant way. In both of those cases, the underlying legal theory was changed at some point in the proceeding. In *Yellow Freight*, the ultimate decision was based on violation of a different statutory provision than the one first charged. In *Bendix*, the FTC decision rested on a completely different theory of competition than the one litigated. However, in the instant case, it is untenable to suggest that reliance on additional protected activities was a change of theory. The Staff at all times claimed that TVA had violated 10 C.F.R. § 50.7 by taking adverse action against an employee because that employee had engaged in protected activity. While the Staff did present evidence of additional protected activity, it did not change the underlying legal theory.[21] For this reason, in additional to those stated above, *Yellow Freight* and *Bendix* do not support TVA's due process claim. [22]

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[21] TVA apparently believes that the Staff should be precluded from using information developed during discovery. This is an unsupportable proposition.

[22] TVA also cites *Mullane v. Central Hanover Bank & Trust Co. et al*, 339 U.S. 306 (1950). However, that case focused on the form of the notice -- whether constructive notice is sufficient -- not on the content or timing of the notice.

VI. The TVA, NEI And Dissenting Board Members Concern About The Ability Of Managers To Take Appropriate Actions Is Unfounded

TVA, NEI and the dissent suggest that upholding the Board's decision will somehow lead to managers being unable to take appropriate actions. They provide no evidence for these claims and as the majority noted, it should not be a problem for managers to follow the rules in taking actions. I.D. at 65. The Staff submits that nuclear safety is far better served by assuring that individuals are free to raise concerns without fear of reprisal than by assuring that industry managers can discriminate a little and take shortcuts in dealing with whistleblowers.

CONCLUSION

For the foregoing reasons, TVA has failed to demonstrate that the Board's Initial Decision was clearly erroneous. Consequently, the Commission should adopt the "contributing factor" standard for use in cases arising under 10 C.F.R. § 50.7, apply that standard under the framework for analyzing discrimination set down by the Supreme Court and followed by DOL, and uphold the Board's decision.

Respectfully submitted,

Dennis C. Dambly
Counsel for NRC Staff

Shelly D. Cole
Counsel for NRC Staff

Dated at Rockville, Maryland
this 3rd day of November, 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	Docket Nos. 50-390-CivP; 50-327-CivP
TENNESSEE VALLEY AUTHORITY	)	50-328-CivP; 50-259-CivP
(Watts Bar Nuclear Plant, Unit 1	)	50-260-CivP; 50-296-CivP
Sequoyah Nuclear Plant, Units 1 & 2	)	50-260-CivP; 50-296-CivP
Browns Ferry Nuclear Plant, Units 1,2 &3)	)	
	)	ASLBP No. 01-791-01-CivP
	)	
	)	EA 99-234

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.713(b), the following information is provided:

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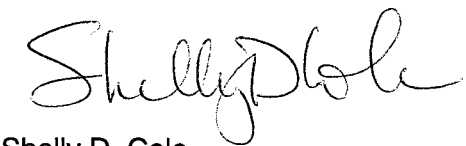
Respectfully submitted,



Shelly D. Cole
Counsel for NRC Staff

Dated at Rockville, Maryland
this 3rd day of November, 2003

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF REPLY TO INITIAL BRIEFS OF THE TENNESSEE VALLEY AUTHORITY AND THE NUCLEAR ENERGY INSTITUTE" and "NOTICE OF APPEARANCE" of Shelly D. Cole in the above-captioned proceeding have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), or by electronic mail as indicated by a double asterisk (**) on this 3rd day of November, 2003.

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