



NRC PUBLIC DOCUMENT ROOM

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of)
UNION ELECTRIC COMPANY)
(Callaway Plant, Units 1 and 2))

Construction Permit Nos. CPPR-139
CPPR-140

12/76
50-403
H26

BRIEF OF WILLIAM SMART IN SUPPORT OF
EXCEPTION TO INITIAL DECISION

INTRODUCTION

This case concerns the authority of the Nuclear Regulatory Commission (NRC or Commission) to investigate the discharge of a construction worker who was fired after he had given information concerning safety violations to the NRC. In addition, the case presents novel questions concerning the Commission's authority to provide a remedy when an investigation reveals that such a discharge was, in fact, retaliatory. The decision of the Atomic Safety and Licensing Board (Licensing Board), from which this appeal has been taken, held that the NRC does have the authority to investigate suspect discharges, but it failed to resolve the more important issue concerning the Commission's power to remedy retaliatory discharges.

The broad statutory authority of the NRC to regulate nuclear energy in a manner that will protect the public health and safety gives the NRC the power to remedy retaliation. This is especially true in light of the particular enforcement provisions which concern: reporting of construction defects; discrimina-

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tion against workers who make complaints to the NRC; and license revocation. Nevertheless, the NRC Staff has, surprisingly, denied that the NRC has any such authority to take corrective action. This leaves William Smart without the protection that the NRC promised him and leaves other workers, whose cooperation the NRC desires, with little confidence in its reliability.

Congress has recognized the need for explicit protection of workers who assist the NRC by passing a statute which gives such authority to the Department of Labor (DOL), which President Carter is expected to sign. Establishment of the NRC's independent continuing authority to take actions to maintain its access to worker information is nonetheless important to the NRC's ability to perform its safety duties. Furthermore, the new legislation will not assist Mr. Smart. The NRC must fulfill its obligation to him. If the NRC Staff's misapprehension of its authority to keep its promise to Mr. Smart is not resolved now, he will have no effective recourse.

Therefore, the Atomic Safety and Licensing Appeal Board (Appeal Board) should eliminate the ambiguity that has resulted from the Staff position and affirmatively recognize the Commission's authority to remedy retaliatory discharges.

I. STATEMENT OF THE CASE

William Smart is an ironworker who was employed for more than a year in the construction of the Callaway Nuclear Power Station in Fulton, Missouri. In the fall of 1977, Mr. Smart

was employed by the Daniel Construction Co. (Daniel), the general contractor of the licensee, Union Electric. Disturbed by numerous faults in the construction process, including installation of defective embedments (a steel plate set in a concrete wall to support other elements of the building), improper spacing of reinforcing bars within the concrete walls, and faulty identification of who had done particular welds, Mr. Smart brought the problems to the attention of his supervisors and later to the NRC. In his early meetings with NRC inspectors, Mr. Smart was promised anonymity and was assured of NRC protection from retaliation for helping the NRC. This assurance was repeated by James Keppler, director of the NRC Region III office, at a meeting in Mr. Smart's home on December 13, 1977, when the NRC officials requested that Mr. Smart accompany them that night to the Callaway site to show the location of the problems he had pointed out.

Bill Smart was demoted from general foreman to foreman effective December 2, 1977. Subsequently, he voluntarily resigned this position to become an ordinary worker. On March 21, 1978, however, Mr. Smart was fired, allegedly for failing to obey a foreman's order.

On March 27, 1978, the NRC sent to Union Electric a notice of violations at the Callaway site and an inspection report, Report No. 50-483/78-01 (Licensing Board's Exhibit No. 1). The report officially confirmed many of the items that Mr. Smart reported relating to the safe operation of the Callaway plant,

including installation of at least one rejected embedment.^{1/}

In addition, the NRC decided to investigate the cause of Mr. Smart's dismissal to find out if Daniel had acted to interfere with the NRC's fulfillment of its safety responsibilities. On March 30, 1978, NRC representatives attempted to examine Daniel's records pertaining to Smart's employment and to interview Daniel employees with knowledge of the circumstances of Smart's dismissal. Daniel refused to allow this investigation to occur.

On April 3, 1978, the NRC Office of Inspection and Enforcement (I&E) issued an Order to Show Cause Why Construction Permits Should Not Be Suspended until Union Electric and Daniel allowed the investigation to be carried out. The Show Cause Order included among the objects of the investigation: to determine

whether there may now exist at the Callaway facility potentially unsafe conditions, the existence of which has not been communicated to the Commission because of the chilling effect on workers at the site of any perception on such workers' part that a worker was discharged because he alleged potentially unsafe conditions to the Commission.^{2/}

Union Electric requested a hearing on the Show Cause Order, which was referred by the Commission to the Licensing Board on May 11, 1978. The Commission's order incorporated the purposes of the investigation stated in the Show Cause Order, including

^{1/} Report No. 50-483/78-01 at 19.

^{2/} Order To Show Cause at 2.

the concern with a chilling effect leading to unreported defects, and listed two issues to be decided. The first was whether the investigation had been refused. The second was whether the Callaway construction permits should be suspended until the investigation was allowed to proceed.^{3/}

On June 15, 1978, William Smart petitioned the Licensing Board to intervene in these proceedings. On June 27, Mr. Smart agreed to a stipulation of facts previously submitted by the NRC Staff and Union Electric, with the understanding that the Licensing Board would take official notice of the NRC reports on its investigations of his safety allegations. Mr. Smart also agreed that there was no need for an evidentiary hearing in light of these undisputed material facts.

While Mr. Smart further agreed to the stipulated statement of certain issues before the Licensing Board concerning the blocked NRC investigation into the causes of his dismissal, he asserted that the issue of the NRC's authority to protect a worker source from retaliation for giving information to the NRC was properly before the Licensing Board. In order to truly guarantee NRC's access to safety information from other construction

^{3/} The Commission's Order also called for consideration of Union Electric's contention that the investigation should be deferred pending the outcome of the grievance proceeding commenced by Mr. Smart's union, the Ironworkers Union. A hearing was conducted by the arbitrator in late September. Briefs were due on October 13. A decision is expected within a month thereafter.

workers, Mr. Smart asserted that it was necessary for the NRC not only to confirm its authority to investigate the possibility that a worker was fired for having raised safety concerns, but also to declare that it possessed the authority to protect a worker source from retaliation for giving information to the NRC. On July 6, the Licensing Board granted Mr. Smart's petition to intervene, accepted the parties' stipulation of facts and agreed upon issues, and took under consideration the issue framed by Mr. Smart.

While both the Staff and Union Electric argued in their briefs that the question of the NRC's authority to remedy retaliation was not ripe, at oral argument on August 23, the NRC Staff addressed, for the first time in this proceeding, the merits of the question of the NRC's remedial authority to protect construction workers who had made safety complaints. James Murray, the Staff's attorney, stated:

We cannot take care of poor Mr. Smart. We can't get his job back for him. But we sure as the devil can pass some rules or set forth some order saying any Licensee of ours who fires a worker because he comes forward and give[s] us safety information won't have his license the next day.

* * *

[W]e don't have in existence a regulation which would help Mr. Smart specifically; but by golly, if we find out this is the reason he was fired we may well -- we need the information to decide whether we ought to have such a regulation. 4/

4/ Transcript of August 23, 1978 Oral Argument to the Licensing Board at 78, 109.

On September 28, 1978, the Licensing Board issued its Initial Decision. The Board ruled that the NRC Staff had acted within its authority in requiring cooperation with its investigation and that the Staff was authorized to suspend the Callaway construction permits until Union Electric and Daniel submitted to the investigation. However, the Licensing Board did not decide whether the NRC has the authority to remedy the retaliatory firing of a construction worker, finding this issue not ripe for decision and not within the issues posed to the Licensing Board by the Commission.

Subsequently, in section 10 of the NRC Authorization Act for FY 1979, Congress amended the Energy Reorganization Act of 1974 to prohibit employment discrimination against any employee of a licensee or its contractors for participation in any NRC proceeding.^{5/} Responsibility for enforcement of this provision is vested in the Secretary of Labor.^{6/}

Enactment of this provision will not undercut the pressing need to resolve the remedial authority issue in this proceeding

5/ The text of the amendment is attached as Appendix A. The NRC FY 1979 Authorization Act was passed by Congress on October 15 and was received by the White House on October 27. President Carter is expected to sign it.

6/ This worker protection provision, with enforcement by the DOL, was patterned after similar provisions which protect workers who participate in proceedings of the Environmental Protection Agency. See, e.g. 33 U.S.C. § 1367; 42 U.S.C. §§ 300j-9(i), 6971, 7622; 15 U.S.C. § 2622.

After establishing the basis of the remedial authority advocated by Mr. Smart, this brief will show that it is necessary in the public interest and in fairness to Mr. Smart for the Appeal Board to decide the remedial authority issue at this time.

II. THE NRC HAS THE AUTHORITY TO PROTECT
CONSTRUCTION WORKER SOURCES FROM RETALIATION

A. NRC Need for Construction Worker Information to Fulfill
Its Safety Mission

The central mission of the NRC is to regulate the use of nuclear energy to assure that, as much as possible, that use does not pose a threat to the public health and safety. The predominant role of public safety considerations in nuclear licensing matters was expressed by the Appeal Board, which stated that the Atomic Energy Act procedures were structured:

to make certain that public safety was a paramount issue at every stage in processing applications for commercial use of nuclear power. As the Supreme Court has noted with approval, the Commission has interpreted the Atomic Energy Act to mandate "that the public safety is the first, last, and a permanent consideration in any decision on the issuance of a construction permit or a license to operate a nuclear facility." Power Reactor Company v. Electricians, 367 U.S. 396, 402 (1961).... 7/

A key ingredient in achieving the goal of public safety is monitoring the construction of nuclear power plants for confor-

7/ Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-315, 3. N.R.C. 101, 103-04 (1976).

mity with specifications and NRC safety standards. With the limited resources available to I&E to monitor proper construction, the NRC is forced to rely on the licensee's quality assurance program, with at most, inspection and testing of a small fraction of the construction work. As I&E described its inspection program:

Prior to construction, the inspection program concentrates on the applicants' establishment and implementation of a quality-assurance program.

* * *

During construction, a sampling of licensee activities is inspected to make sure that the requirements of the construction permit are followed and that the plant is built according to design and applicable codes and standards. Construction inspections look for qualified personnel, quality material, conformance to approved design and for a well-formulated and satisfactorily implemented quality-assurance program, since these factors are most important to the successful construction of a nuclear plant. The licensee's implementation of these elements is assessed by examination, on a spot check basis, of construction activities. ^{8/}

A recent report of the General Accounting Office is sharply critical of the NRC's oversight of the safe construction of nuclear power plants.^{9/} The basic flaw found by the GAO is

8/ "Revised Inspection Program for Nuclear Power Plants " NUREG-0397 at 6 (March 1978). Several licensing decisions have emphasized the importance of quality assurance and the NRC's role in checking the licensee's quality assurance program. E.g. Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-124, 6 A.E.C. 358, 361 (1973), Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), LBP-74-17, 7 A.E.C. 487, 517 (1974).

9/ "The Nuclear Regulatory Commission Needs to Aggressively Monitor and Independently Evaluate Nuclear Powerplant Construction," EMD-78-80 (Sept. 7, 1978).

the NRC's almost complete reliance on self-monitoring by nuclear power plant builders, resulting from the NRC inspectors spending most of their on-site time reviewing company construction records. The GAO recommends that the NRC inspectors spend more time at construction sites, do independent testing of construction work, and seek out information on construction problems from workers.^{10/}

Until the NRC develops a greater independent capacity for detecting breakdowns in quality assurance programs, it needs the assistance of construction workers. Given the NRC's reliance on the paper record of construction backed up by a small sampling program, the concerned construction worker can be the eyes and ears of the NRC inspectors to draw their attention to mistakes in the record and actual flaws in the construction for further investigation.

The NRC has explicitly encouraged such assistance by workers.^{11/}

^{10/} Id. at 11. The GAO is concerned that the investigation of worker allegations is "very time consuming," but recognizes that such investigations are "necessary" and finds the NRC's access to allegations of poor construction practices "a very useful tool." Id. at 12, 20-21.

^{11/} In promulgating regulations requiring licensees and their contractors, inter alia, to report to the NRC a failure to comply with its safety standards or a defect related to safety, (see section II.C.1, infra), the Commission stated that:

individuals that are not subject to the requirements of any part of Title 10 are encouraged, but not required, to report to the Commission known or suspected defects or failure to comply. As authorized by law, the identity of anyone so reporting will be withheld from disclosures.

However public spirited a worker with material information he wishes to give to the NRC may be, he is much more likely to speak up if he knows that he will be protected from retaliation by his employer. The NRC's authority to counter an action by a licensee to block the NRC's access to worker information flows from the NRC's broad statutory authority to assure nuclear safety.

B. Broad NRC Authority to Assure Nuclear Safety

The NRC has exceptionally broad authority, under the Atomic Energy Act and the Energy Reorganization Act of 1974, to regulate commercial application of nuclear energy. As stated by the D.C. Circuit:

Congress agreed [as to the desirability of flexibility] by enacting a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives.

Siegel v. Atomic Energy Commission, 400 F. 2d 778, 783 (D.C. Cir. 1968).

The civilian nuclear industry was created by the amendments to the Atomic Energy Act in 1954, in which the federal government gave up its monopoly on nuclear energy. The quid pro quo for this relinquishment is that the federal government retained great residual regulatory powers over private nuclear activities.

The extensive federal regulatory authority over nuclear energy is one of the main judicial guideposts in deciding cases concerning potential hazards of radioactivity. The Eighth Cir-

cuit found support in the pervasive federal regulatory scheme and the origins of nuclear energy as a federal monopoly for its holding that state regulation of radioactive emissions is preempted.^{12/} Citing that case, the Supreme Court found no subsequent congressional intention to alter "the pervasive regulatory scheme embodied in the [Atomic Energy Act]." Train v. Colorado Public Interest Research Group, 426, U.S. 1, 24 (1976).

C. Specific NRC Authority to Protect Worker Sources

1. Enforcement of Requirement to Report Defects

Union Electric and Daniel are required to report to the NRC any noncompliance with NRC safety standards or a defect which is related to safety.^{13/} The directors and responsible officers of a company can only comply with this requirement if relevant information is given to them by its agents and employees. The NRC is authorized by the enforcement provision of section 206 of the Energy Reorganization Act of 1974 ^{14/} to take action against a company which attempts to undermine this reporting require-

12/ Northern States Power Co. v. Minnesota, 447 F. 2d 1143, 1152-53 (8th Cir. 1971), aff'd mem., 402 U.S. 1035 (1972).

13/ Section 206(a) of the Energy Reorganization Act of 1974, 42 U.S.C. § 5846(a). See also 10 C.F.R. § 21.21.

14/ The Commission is authorized to conduct such reasonable inspections and other enforcement activities as needed to insure compliance with the provisions of this section.

42 U.S.C. § 5846(d).

ment by preventing its employees from bringing safety problems to the attention of their supervisors or the NRC.

Suppose a general contractor had a sign at the entrance saying that any employee who brought safety problems to the attention of anyone else (fellow worker, supervisor, or NRC inspector) would be docked two days' pay. Such a situation would call for enforcement action against the construction permit holder for interference with the reporting requirement. Since Union Electric has blocked the NRC's investigation of Mr. Smart's discharge and implicitly makes the sweeping claim that no circumstances found by that investigation would warrant remedial action by the NRC, it must be assumed in this proceeding that the firing of Mr. Smart has had a similar effect without the posting of a sign.

2. Explicit Protection of Workers Who Participate in NRC Procedures

10 C.F.R. Part 19 was adopted to implement the Atomic Energy Commission's responsibility for the personal safety of workers in licensed facilities. 38 F.R. 22217 (Aug. 17, 1973). The regulations reflect a division of jurisdiction over working conditions between the NRC and OSHA, in which OSHA oversees worker safety in nuclear plants under construction and the NRC takes over when they go into operation. 10 C.F.R. § 19.3(d). Section 19.16(c) provides:

No licensee shall discharge or in any manner discriminate against any worker because such worker has filed any complaint or instituted any proceeding under the regulations in this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such worker on behalf of himself or others of any option afforded by this part.

OSHA is not responsible for the type of information provided by Mr. Smart, which affects the safety of the public in the future. The information he provided is directed precisely to the NRC's responsibilities and is clearly information that it wishes to receive. Thus, in dividing the jurisdiction for workers' complaints between OSHA and the NRC, the present type belongs to the NRC. Since responsibility for such public safety complaints is with the NRC, protection of workers making such complaints is also up to the NRC. The regulations of 10 C.F.R. Part 19 easily lend themselves to an interpretation which includes the protection of Mr. Smart in keeping with the NRC purpose stated above.

The protection of section 19.16(c) goes to "workers," who are defined as "individual[s] engaged in activities licensed by the Commission and controlled by a licensee." 10 C.F.R. § 19.3(c). The definition of license in section 19.3(d), being inclusive, cannot be read as excluding construction permits. Indeed, section 185 of the Atomic Energy Act provides that "[f]or all other purposes of this [Act], a construction permit is deemed to be a 'license'." 42 U.S.C. § 2235. The Commission presumably was using that work in its statutory sense to cover worker complaints which fall between the cracks of the OSHA-NRC jurisdictional division.

Interpretation of § 19.16(c) to cover construction workers making public safety information available to the NRC is com-

patible with the reasons for promulgating Part 19 and with the needs of the NRC to conduct its regulatory duties more effectively. As put by the Appeal Board:

We have long held the view that "[i]n the interpretation and application of [a Commission] regulation, [there is] no mandate to accord the language employed by the Commission the most restrictive reach which a lexicologist would find acceptable. Rather, where several alternative interpretations are possible, we should make the choice which comes closest to fulfilling the regulation's objectives." Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-152, 6 AEC 816, 818 (1973). ^{15/}

Even if the Staff is correct that 10 C.F.R. Part 19 is not applicable to this proceeding,^{16/} the adoption of section 19.16(c) demonstrates that the Commission has decided that it has statutory authority to protect workers who make complaints to the NRC related to their radiological occupational safety. That statutory basis is at least as applicable to construction workers making safety complaints which relate to the NRC's essential mission of assuring the future safe operation of nuclear power plants. Even if there were no applicable regulation, the NRC can take the remedial action necessary to its role to protect the public

^{15/} Southern California Edison Company (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-303, 3 N.R.C. 20, 25 (1976).

^{16/} Staff Brief in Reply to Intervenor's Brief at 2.

health and safety through adjudication.^{17/} Establishment of the NRC's remedial authority through the present adjudication would be fair, since the principally concerned parties are present, and would involve no unfair surprise, since the NRC Staff would probably exercise the authority in a way allowing Union Electric to comply before suffering any drastic sanction.

3. Power to Revoke License

A construction permit may be revoked:

because of conditions revealed by such application or statement of fact or any report, record, or inspection or other means which would warrant the Commission to refuse to grant a license on an original application... ^{18/}

This provision gives the NRC the enforcement power of suspending or revoking the Callaway construction permits if Union Electric acted to undermine its quality assurance program or to interfere with the NRC's safety inspection program. If, after an NRC finding of such undermining or interference, a licensee refused to implement the remedial action ordered by the NRC, that might demonstrate an attitude sufficiently antithetical to the NRC's supervision to justify suspension or revocation of a license.

^{17/} Section 161(b) of the Atomic Energy Act authorizes the Commission to:

establish by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property.

42 U.S.C. § 2201(b) (emphasis supplied). See NLRB v. Bell

Aerospace Co., 416 U.S. 267, 294 (1974). See also NAACP v. FPC, 425 U.S. 662, 668 (1976).

^{18/} 42 U.S.C. § 2236(a). See also 10 C.F.R. § 50.100.

III. THE APPEAL BOARD SHOULD RULE ON THE
NRC'S REMEDIAL AUTHORITY

A. William Smart's Need For Resolution of the Remedial
Authority Issue In This Proceeding

The new provision of the Energy Reorganization Act^{19/} will, when enacted, significantly enhance the NRC's access to worker information by restoring workers' willingness to risk the adverse consequences of communicating with the NRC on safety matters. However, because the provision is not retroactive, it will not remedy Mr. Smart's firing. In light of the Staff's position that it lacks the authority to take any action to protect Mr. Smart regardless of the outcome of its investigation, the danger faced by Mr. Smart is that even if the investigation shows that he was fired in retaliation for giving safety information to the NRC, the NRC Staff will sit on its hands and do nothing for him because of its belief that it lacks remedial authority.^{20/}

^{19/} See Appendix A.

^{20/} Mr. Smart's only recourse in that situation would be to request the Staff to reverse its position yet again in a show cause proceeding under 10 C.F.R. § 2.206. Availability of this channel is not a basis for refusing to decide the issue now. In the first place, the request to the Staff would probably be in vain and accomplish nothing but further delay in determining the NRC's powers and duties with regard to Mr. Smart. Secondly, Mr. Smart would be prohibited, by 10 C.F.R. § 2.206(c)(2), from appealing the Staff's decision. Finally, whereas the primarily concerned persons are parties to this proceeding, there is no mechanism provided for participation of Union Electric in such a show cause proceeding.

The declaratory relief now sought by Mr. Smart is proper under the doctrine of the Wolf Creek case.^{21/} There, the applicant needed to know which of its construction activities the NRC had authority to regulate under NEPA in order to determine what construction was permissible in advance of NRC licensing. An alternative holding of the Appeal Board was that this need could be satisfied by a declaratory ruling under the Commission's delegation of its powers under the Administrative Procedure Act.^{22/} Mr. Smart has great need of a ruling now because he cannot otherwise adequately challenge the Staff's position. The issue is sharply drawn and concrete because of the absolute position of Union Electric and the Staff that there is no remedial action the NRC could take, no matter what the current investigation shows.

If declaratory judgment on an issue which affects the timing of one reactor is proper, it is also proper to resolve an issue which is crucial to a worker who cooperated with the NRC, relying on its assurance of protection.^{23/} Even if the Appeal Board decides that the need of Mr. Smart alone is not sufficient to prompt a decision, the matter should be resolved because of the continuing safety significance of the NRC's authority to protect worker sources.

^{21/} Kansas Gas and Electric Co. (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-321, 3 N.R.C. 293 (1976).

^{22/} Id. at 302-03.

^{23/} See also Offshore Power Systems (Floating Nuclear Power Plants), ALAB-500, 8 N.R.C. ____ (Sept. 29, 1978), in which the Appeal Board acted to obtain prompt, conclusive resolution of an issue -- whether the Staff could consider Class 9 accidents in licensing floating nuclear plants -- by certifying the issue to the Commission. The Appeal Board should be evenhanded in deciding whether to answer questions arising in licensing proceedings, whether raised by the licensee, the NRC Staff, or intervenors.

B. Continuing Significance of the NRC's Remedial Authority

The legislative history of the new worker source protection provision contains no indication that Congress intended to alter the NRC's authority by creating new authority in the DOL or that Congress believed that NRC authority to remedy retaliatory firing of a worker source did not already exist. If the NRC's concern over possible retaliatory firing of a worker source is as important to its safety mission as the Licensing Board found, as discussed in section II.A above, it is necessary that the NRC maintain its independent remedial authority to carry out its responsibilities. The DOL may have its own view of its priorities and the severity of particular instances of employment discrimination. The NRC, on the other hand, knows of its problem of worker access and has the authority to take the necessary action to maintain that access. There is no conflict between the agencies or preemption of existing NRC authority.

The Staff's denial of its remedial authority therefore has an immediate and continuing effect. The Staff's position means that even if the NRC has the authority, the Staff won't use it. NRC access to worker safety information may suffer. The ongoing significance of the NRC's remedial authority and the Staff's misapprehension of its authority brings the issue within the scope of the Commission's order initiating this proceeding before the Licensing Board since the order incorporated I&E's concern for possible unreported safety defects at Callaway as a result of the chilling effect of Mr. Smart's discharge. Not only would a

declaration of NRC's independent remedial authority promote its access to workers, but there may well be a residual chilling effect on workers' willingness to risk their jobs by cooperating with the NRC due to the NRC's well publicized reversal in this case and its assertion that it is unable to honor its promise to William Smart to protect him from retaliation. Since the issue is within the Licensing and Appeal Boards' mandate from the Commission, and since the proper parties are present and the Staff's position is otherwise unreviewable as a practical matter, the Appeal Board should decide the issue raised by the relief requested by Mr. Smart.

C. Relief Requested

William Smart is not asking the Appeal Board for reinstatement or any other sanction against Union Electric for his firing. The issue is not what the NRC Staff should do for Mr. Smart, but whether the Staff can do anything for him based on any conceivable findings of its investigation. Since Union Electric, in this proceeding, denies the authority of the NRC to investigate based on its reasonable suspicion of retaliatory firing, it follows that Union Electric would maintain that no findings of retaliatory job discrimination could support NRC sanctions or remedial orders against a licensee. The NRC Staff apparently concurs in this conclusion although not the premise.

William Smart seeks a declaration from the Appeal Board that the NRC does have the authority to order a licensee to remedy a situation of employment discrimination which the NRC has found to interfere with the willingness of construction workers to give safety information to the NRC. The sanctions could include:

1) reinstatement of a fired worker with back pay; 2) a fine; 3) notice to employees of the NRC's finding of retaliation and the employer's promise not to do it again; and 4) suspension or revocation of the construction permit.

The Appeal Board need not decide what sanction would be appropriate in particular circumstances. That choice would be in the Staff's discretion in the first instance. However, the question of whether the NRC has any remedial authority is currently in dispute and affecting the parties. Since the issue is purely legal and may be resolved on the stipulated facts, the Appeal Board should decide the issue itself without a remand to the Licensing Board.

CONCLUSION

For the foregoing reasons, the Appeal Board should rule that the Licensing Board ought to have resolved the NRC's remedial authority and should declare that the NRC has the authority to impose appropriate sanctions on a licensee if the NRC finds that a construction worker was dismissed for making safety allegations to the NRC.

Respectfully submitted,

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November 2, 1978

AUTHORIZING APPROPRIATIONS, NUCLEAR
REGULATORY COMMISSION, FISCAL YEAR 1979

October 14, 1978.—Ordered to be printed

Mr. UDALL, from the committee of conference,
submitted the following

CONFERENCE REPORT

[To accompany S. 2584]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 2584) a bill to authorize appropriations to the Nuclear Regulatory Commission for fiscal year 1979, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment insert the following:

Section 1. (a) There is hereby authorized to be appropriated to the Nuclear Regulatory Commission in accordance with the provisions of Section 261 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2017), and Section 905 of the Energy Reorganization Act of 1974, as amended (42 U.S.C. 5875), for the fiscal year 1979, to remain available until expended \$333,007,000. Of such total amount authorized to be appropriated:

(1) not more than \$47,162,000 may be used for "Nuclear Reactor Regulation"; of the total amount appropriated for this purpose, \$2,080,000 shall be available for Advanced Reactors;

(2) not more than \$38,760,000 may be used for "Inspection and Enforcement";

(3) not more than \$14,945,000 may be used for "Standards Development"; of the total amount appropriated for this purpose, \$650,000 shall be available for Low-Level Radiation activities, including those described in Section 5 of this Act;

(4) not more than \$27,240,000 may be used for "Nuclear Material Safety and Safeguards"; of the total amount appropriated for this purpose, \$8,700,000 shall be available for Nuclear Waste Disposal and Management activities;

(b) Within thirty days after the date of enactment of this section, the Commission and the Environmental Protection Agency shall submit to the Congress a memorandum of understanding to delineate their responsibilities in the conduct of the planning studies authorized by subsection (a) of this section.

(c) On or before April 1, 1979, the Commission and the Environmental Protection Agency shall submit a report to the Congress containing an assessment of the capabilities and research needs of such agencies in the area of health effects of low-level ionizing radiation.

(d) On or before September 30, 1979, the Commission and the Environmental Protection Agency, in consultation with the Secretary of Health, Education and Welfare, shall submit a report to the Congress which includes a study of options for Federal epidemiological research on the health effects of low-level ionizing radiation, with evaluations of the feasibility of such options. Such report shall be consistent with the findings of the assessment required by subsection (c) of this section.

(e) In carrying out the activities specified in subsections (c) and (d) such agencies shall:

- (i) cooperate with appropriate scientific organizations and agencies involved in related research, and
- (ii) furnish copies of the reports required by those subsections to the organizations and agencies referred to in subsection (e) (i).

SEC. 6. Section 201 of the Energy Reorganization Act of 1974 is amended by adding the following new subsection at the end thereof:

"(d) The Executive Director shall prepare and forward to the Commission an annual report (for the fiscal year 1978 and each succeeding fiscal year) on the status of the Commission's programs concerning domestic safeguards matters including an assessment of the effectiveness and adequacy of safeguards at facilities and activities licensed by the Commission. The Commission shall forward to the Congress a report under this section prior to February 1, 1979, as a separate document, and prior to February 1 of each succeeding year as a separate chapter of the Commission's annual report (required under section 307(c) of the Energy Reorganization Act of 1974) following the fiscal year to which such report applies."

SEC. 7. The Commission is authorized and directed to undertake a comprehensive review of the existing process for selection and training of members of the Atomic Safety and Licensing Boards, including, but not limited to, the selection criteria, including qualifications, the selection procedures, and the training programs for Board members. The Commission shall report to the Congress on the findings of such review by January 1, 1979, and shall revise such selection and training process as appropriate, based on such findings.

SEC. 8. (a) Chapter 14 of the Atomic Energy Act of 1954 is amended by adding the following new section at the end thereof:

"SEC. 170A. CONFLICTS OF INTEREST RELATING TO CONTRACTS AND OTHER ARRANGEMENTS.—

"(a) The Commission shall, by rule, require any person proposing to enter into a contract, agreement, or other arrangement, whether by competitive bid or negotiation, under this Act or any other law administered by it for the conduct of research, development, evaluation activities, or for

technical and management support services, to provide the Commission, prior to entering into any such contract, agreement, or arrangement, with all relevant information, as determined by the Commission, bearing on whether that person has a possible conflict of interest with respect to—

"(1) being able to render impartial, technically sound, or objective assistance or advice in light of other activities or relationships with other persons, or

"(2) being given an unfair competitive advantage. Such person shall insure, in accordance with regulations prescribed by the Commission, compliance with this section by any subcontractor (other than a supply subcontractor) of such person in the case of any subcontract for more than \$10,000.

"(b) The Commission shall not enter into any such contract agreement or arrangement unless it finds, after evaluating all information provided under subsection (a) and any other information otherwise available to the Commission that—

"(1) it is unlikely that a conflict of interest would exist, or

"(2) such conflict has been avoided after appropriate conditions have been included in such contract, agreement, or arrangement, except that if the Commission determines that such conflict of interest exists and that such conflict of interest cannot be avoided by including appropriate conditions therein, the Commission may enter into such contract, agreement, or arrangement, if the Commission determines that it is in the best interests of the United States to do so and includes appropriate conditions in such contract, agreement, or arrangement to mitigate such conflict.

"(c) The Commission shall publish rules for the implementation of this section, in accordance with section 553 of title 5, United States Code, without regard to subsection (a)(2) thereof, as soon as practicable after the date of the enactment of this section, but in no event later than 120 days after such date."

(d) The table of contents for such chapter 14 is amended by adding the following new item at the end thereof:

"Sec. 170A. Conflicts of interest relating to contracts and other arrangements."

SEC. 9. The Commission shall monitor and assess, as requested, the International Fuel Cycle Evaluation and the studies and evaluations of the various nuclear fuel cycle systems by the Department of Energy, in progress as of the date of enactment, and report to the Congress semi-annually through calendar year 1981 and annually through calendar year 1982 on the status of domestic and international evaluations of nuclear fuel cycle systems. This report shall include, but not be limited to, a summary of the information developed by and available to the Commission on the health, safety and safeguards implications of the leading fuel cycle technologies.

SEC. 10. Title II of the Energy Reorganization Act of 1974, as amended, is amended by adding at the end thereof a new section to read as follows:

"EMPLOYEE PROTECTION

"SEC. 210. (a) No employer, including a Commission licensee, an applicant for a Commission licensee, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compen-

sation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) —

"(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this Act or the Atomic Energy Act of 1954, as amended;

"(2) testified or is about to testify in any such proceeding or;

"(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended.

"(b)(1) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, within thirty days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor thereunder in this subsection referred to as the 'Secretary' alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint and the Commission.

"(2) (A) Upon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint. Within thirty days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complainant and any person acting in his behalf and the person alleged to have committed such violation of the results of the investigation conducted pursuant to this subparagraph. Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for public hearing. The Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant.

"(B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

"(c)(1) Any person adversely affected or aggrieved by an order issued under subsection (b) may obtain review of the order in the United States court of appeals for the circuit in which the violation, with respect to which

the order was issued, allegedly occurred. The petition for review must be filed within sixty days from the issuance of the Secretary's order. Review shall conform to chapter 7 of title 5 of the United States Code. The commissionment of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the Secretary's order.

"(2) An order of the Secretary with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in any criminal or other civil proceeding.

"(d) Whenever a person has failed to comply with an order issued under subsection (b)(2), the Secretary may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this subsection, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief, compensatory, and exemplary damages.

"(e)(1) Any person on whose behalf an order was issued under paragraph (2) of subsection (b) may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

"(2) The court, in issuing any final order under this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

"(f) Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of title 28 of the United States Code.

"(g) Subsection (a) shall not apply with respect to any employee who acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this Act or of the Atomic Energy Act of 1954, as amended."

SEC. 11. The Commission shall report to the Congress on January 1, 1979, and annually thereafter on the use of contractors, consultants, and the National Laboratories by the Commission. Such report shall include for each contract issued, in progress or completed during fiscal year 1978, information on the bidding procedure, nature of the work, amount and duration of the contract, progress of the work, relation to previous contracts, and the relation between the amount of the contract and the amount actually spent.

SEC. 12. (a) The Commission, in cooperation with the Department of Energy, is authorized and directed to conduct a study of extending the Commission's licensing or regulatory authority to include categories of existing and future Federal radioactive waste storage and disposal activities not presently subject to such authority.

(b) Each Federal agency, subject to the provisions of existing law, shall cooperate with the Commission in the conduct of the study. Such cooperation shall include providing access to existing facilities and sites and providing any information needed to conduct the study which the agency may have or be reasonably able to acquire.

(c) On or before March 1, 1979, the Commission shall submit a report to the Congress containing the results of the study. The report shall in-

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of)
) Construction Permit Nos. CPPR-139
UNION ELECTRIC COMPANY) CPPR-140
(Callaway Plant, Units 1 and 2)

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of the foregoing
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