UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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

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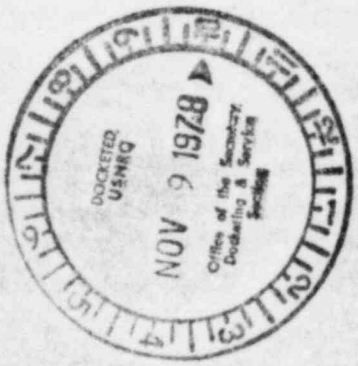
UNION ELECTRIC COMPANY'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE INITIAL DECISION



WM. BRADFORD REYNOLDS
GERALD CHARNOFF
SHAW, PITTMAN, POTTS & TROWBRIDGE
1800 M Street, N.W.
Washington, D. C. 20036

Counsel for Union Electric Company

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Counsel for Union Electric Company

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INTRODUCTION

On September 28, 1978, an Atomic Safety and Licensing Board ("Licensing Board") issued its Initial Decision in the above show cause proceeding, authorizing the Director, Office of Inspection and Enforcement, Nuclear Regulatory Commission ("NRC"), to suspend Union Electric Company's Construction Permits Nos. CPPR-139 and CPPR-140 until such time as the company and its contractor submit to an NRC investigation into the causes for firing an employee working at the Callaway construction site. Union Electric Company filed exceptions to the Initial Decision on October 6, 1978. [1]

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1 Simultaneously, the Company requested the Appeal Board to stay suspension of the construction permits pending consideration of and a decision on the appeal. At an informal conference among all counsel and members
(continued next page)

Four substantive issues are raised in Union Electric Company's exceptions, namely: (a) whether the NRC has legal authority to conduct an investigation into the causes of William Smart's discharge; (b) if such authority exists, whether proper procedures were followed by the NRC in the present case in exercising that authority; (c) whether the NRC should in any event defer any such investigation that might be authorized until ongoing grievance proceedings invoked by William Smart are concluded; and (d) what remedy, if any, is appropriate in the circumstances if it is determined that the requested NRC investigation should have been permitted. [2]

The Licensing Board gave each of these questions only the most superficial treatment. It concluded that the broad

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of the Appeal Board, agreement was reached by the parties on procedures to be followed while the appeal is pending so as to remove the spectre of a possible suspension order during the review period. This agreement was submitted to and accepted by the Appeal Board, as reflected in its Memorandum and Order of October 20, 1978. See ALAB-503.

2 Union Electric Company also took exception to the procedural ruling below involving two documents which the Licensing Board declined to accept into the record. In addition, intervenor William Smart filed a single exception to the Initial Decision on October 3, 1978, objecting to the Licensing Board's refusal to entertain in this proceeding two unrelated issues raised by Mr. Smart questioning whether the NRC has authority to take remedial action in favor of a discharged employee if it should ultimately be determined that the discharge was not for good cause.

language contained in Sections 161(c) and (o) of the Atomic Energy Act (42 U.S.C. §§ 2201(c) and (o)), together with the similarly worded regulation contained in 10 C.F.R. §50.70, was sufficient authorization for the NRC to investigate management's discharge decision as a function of the agency's responsibility to protect public health and safety (I.D. at pp. 15-16). It further found the existence of pervasive industry regulation an adequate ground for dispensing with any requirement that the NRC inspectors give prior notice to the employer by way of warrant or subpoena (I.D. at p. 17). Deference to a parallel union grievance proceeding, which was simultaneously looking into the causes of William Smart's firing, was deemed to be inappropriate (I.D. at pp. 18-19). And, suspension of the construction permits until the referenced investigation was allowed to take place was required, in the Licensing Board's opinion, to assure public safety (I.D. at pp. 19-20).

For the reasons set forth below, Union Electric Company disagrees with the decision of the Licensing Board in each of the above particulars. In brief, it is the company's position that the NRC does not have adequate statutory or regulatory authority to conduct an investigation into the circumstances surrounding the firing of a utility contractor's employee working at an authorized construction site. Moreover,

even assuming that the Commission's nuclear oversight responsibility were to permit NRC involvement in labor disputes of this sort, Union Electric Company submits that such activity cannot and should not be undertaken without the NRC first formulating and then following certain procedures to safeguard against unwarranted intrusions upon privacy rights. Nor do we think it wise for the NRC to move forward with any such investigation while grievance proceedings which focus on the identical labor dispute are underway pursuant to the employee's request. Finally, Union Electric Company believes that, whatever the Appeal Board's view of the foregoing issues, suspension of Construction Permits Nos. CPPR-139 and CPPR-140 is both inappropriate and unwarranted as a remedy in the present circumstances.

Before discussing the reasoning behind each of the foregoing conclusions, a description of the uncontested factual context in which the present controversy is set is appropriate. [3]

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3 Prior to the hearing below, counsel for the NRC and for Union Electric Company entered into a Stipulation as to the essential facts involved and the legal questions to be presented. At a prehearing conference before the Licensing Board on June 6, 1978, counsel for William Smart, the discharged worker who petitioned and was allowed to intervene in the present proceeding, agreed to the terms of the aforesaid Stipulation in all respects, but asked that the Licensing Board also consider two new issues (See n.2, supra). Said Stipulation is set out in full in the margin of the Initial Decision. See I.D. at n.2, pp. 4-7.

AGREED FACTS

William Smart was an ironworker employed by Daniel Construction Company ("Daniel Construction"), a division of Daniel International Corporation, to work at the Callaway construction site. During the course of his employment, Mr. Smart had on occasion made allegations to the NRC about safety problems which, he claimed, existed as a result of the ongoing site work and required correction to avoid possible unsafe conditions at the Callaway facility that, in Mr. Smart's opinion, might jeopardize the public health and safety. See Show Cause Order, dated April 3, 1978, at p. 1. These allegations were investigated by NRC inspectors, with the full cooperation of Daniel Construction and Union Electric; at no time were any circumstances found to exist which would warrant a suspension of the Callaway construction activity. [4]

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4 Counsel for William Smart asked that the Licensing Board take judicial notice of one of the investigative reports of the Office of Inspection and Enforcement, Region III, relating to its site inspection of safety problems. See Report No. 50-483/78-01. As that Report indicates, no obstruction whatsoever has been placed in the way of the NRC examining all allegations of safety concerns; nor has there been any hesitancy on the part of Union Electric or Daniel Construction in working with the NRC to remedy all imperfections which have been discovered and needed correction. See Licensing Board Prehearing Transcript of June 6, 1978, at pp. 28-30.

On March 21, 1978, William Smart was fired by Daniel Construction, allegedly because he had refused to obey a work order given by his foreman. Mr. Smart, claiming that the firing was retaliatory action taken in response to the safety complaints he had lodged with the Commission, promptly initiated grievance proceedings to investigate the firing -- as provided for under Article VII of the Callaway Project Agreement between Daniel Construction and the involved employee unions. That Agreement sets forth a six-step procedure to be followed "as the exclusive means for resolving the dispute", with the final step being binding arbitration following hearings before a designated arbitrator. [5]

Without awaiting the outcome of the grievance proceedings, the NRC, through its Office of Inspection and Enforcement, undertook on March 30, 1978, to carry out its own

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5 The first five steps in the grievance proceeding, each of which was invoked by the parties to no avail, are as follows: (1) meeting between steward and foreman; (2) meeting between steward, foreman and superintendent; (3) meeting between steward, foreman and general superintendent; (4) meeting between union business representative and general superintendent or project manager; (5) meeting between a representative from the International Union and a representative of Daniel's Corporate Labor Relations Group.

On November 1, 1978, the designated arbitrator rendered his decision. Finding that an insufficient showing had been made that Mr. Smart heard and fully comprehended the work order given by his foreman, the arbitrator concluded that the firing was unwarranted in the circumstances. He ordered reinstatement of Mr. Smart with back pay.

parallel investigation of the firing of William Smart. However, when the NRC inspectors requested access to Daniel Construction's records and personnel for the purpose of reviewing the discharge decision, they were refused. The nature of this refusal is not a matter of dispute. It does not go to the NRC's investigative efforts pertaining to the allegations of safety problems; these continue unimpeded. Nor does it go to the NRC's interrogation of company employees at the site regarding their continued willingness, or alleged hesitancy, to alert the NRC as to what they perceive to be unsafe design or construction work; such inquiry of company personnel has at no time been prevented by Daniel Construction, and, indeed, probably could not be even if the contractor desired to do so. [6]

Rather, the investigation denied in this case concerns only the circumstances of William Smart's firing. Daniel Construction refused to allow the NRC to look into this isolated matter to avoid prejudicing the ongoing union grievance proceedings (see n.23, infra). In the circumstances,

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6 NRC inspectors are on location at the Callaway construction site regularly and have full access to the workers. Accordingly, there is, as a practical matter, no ability to restrict NRC inspectors from talking with the employees of Daniel Construction about any number of topics, including the question of a possible "chill" on workers' complaints to the NRC as a result of Mr. Smart's firing.

Union Electric Company concluded that it could not justify compelling, or attempting to compel, Daniel Construction to alter its position. Accordingly, on April 3, 1978, the Director, Office of Inspection and Enforcement, issued an "Order to Show Cause Why Construction Permits Should Not Be Suspended" until the requested investigation is allowed to take place. [7] Following Union Electric Company's Answer to the Show Cause Order on April 21, 1978, in which a request was made for a hearing, the matter was assigned to the Licensing Board below. See Notice of Hearing, 43 Fed. Reg. 21389 (May 17, 1978). Its Initial Decision of September 28, 1978 is the subject of the instant appeal.

LEGAL DISCUSSION

I. THE NRC IS WITHOUT LEGAL AUTHORITY TO INVESTIGATE THE LABOR PRACTICES OF A CONTRACTOR WORKING AT A NUCLEAR CONSTRUCTION SITE

The central inquiry raised by the present Show Cause Order is whether the NRC has authority to conduct its own

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7 The NRC issued Construction Permits Nos. CPPr-139 and CPPR-140 to Union Electric Company on April 16, 1976. Construction work at the Callaway site has continued uninterrupted for the past two and one-half years. Essentially all excavation work is now concluded; over 9 million construction manhours have been expended on the job; 75 percent of the structural steel is erected; 65 percent of the structural concrete is in place; 50 percent of the large power block piping has been installed; and the project is approximately 25 percent completed.

investigations into the labor practices of a utility's contractor performing construction work at a nuclear power plant site. The question is one of first impression for this agency. Prior to this case, the NRC has neither asserted nor exercised authority to conduct an investigation into the causes underlying disciplinary action taken against a construction worker. Nor have any regulations dealing with such an investigation yet been promulgated by the NRC. Indeed, one of the stated purposes of the present investigation of Mr. Smart's firing was to determine "whether the Commission's regulations should be amended" to address this very situation. [8]

The Licensing Board below was umimpressed by the novelty of this legal issue. In its view the broad language contained in Sections 161(c) and (o) of the Act (42 U.S.C. §§ 2201(c) and (o)), provides ample authority for the NRC to

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8 See "order to Show Cause Why Construction Permits Should Not Be Suspended", at p. 1. Union Electric Company has maintained throughout this proceeding that it would not oppose a regulation which expressly provides that all workers involved in construction activities are encouraged to communicate with the NRC concerning matters which could jeopardize the public health and safety. Nor are we opposed to the promulgation of specific regulatory guidelines dealing with labor investigations of the sort involved here if it is determined that there is statutory authority for such activity (see pp. 29-30, infra).

venture into this new area of responsibility. These provisions permit investigative activities by the Commission if undertaken "to assist in exercising any authority provided in [the] Act, or in the administration or enforcement of [the] Act, or any regulations or orders issued thereunder" (Section 161(c)), or if required "to effectuate the purposes of [the] Act" (Section 161(o)).

We certainly cannot quarrel with the Licensing Board's focus on the above quoted statutory language as the proper reference point for resolving the question here of legal authority. There simply are no other provisions in the Atomic Energy Act that even come close to addressing the matter at hand. However, Union Electric Company strenuously disagrees with the decision reached below that the particular NRC investigation proposed in this instance fits within the intended parameters of these controlling sections.

Investigations contemplated by the designated statutory provisions are such as are necessary to accomplish and carry out the essential purposes underlying the legislation. Those purposes are well recognized. The overriding concern of the Atomic Energy Act is with the development and regulation of nuclear power plants, including the production and utilization of the atomic energy output therefrom. It is from this perspective that Congress has

delegated to the NRC primary responsibility for regulating the design, construction and operation of nuclear facilities in accordance with such standards and controls as the Commission deems necessary to protect the public health and safety. [9]

To be sure, this legislative mandate was intended to be broadly interpreted. See Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-315, 3 NRC 101, 103-04 (1976); and see Siegel v Atomic Energy Commission, 400 F.2d 778, 783 (D.C. Cir. 1968). Even so, agency responsibility to safeguard the public health and safety in this area does not give the NRC unfettered regulatory authority for all purposes. Judicial precedent makes it perfectly clear that jurisdictional limits on the Commission's power have been recognized from time to time. See, e.g., New Hampshire v Atomic Energy Commission, 406 F.2d 170 (1st Cir. 1969); Cities of Statesville v Atomic Energy Commission, 441 F.2d 962 (D.C. Cir. 1969).

While neither New Hampshire nor Cities of Statesville is directly on point for purposes of the present proceeding,

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9 That the obvious thrust of the Atomic Energy Act is directed toward oversight responsibility with respect to the nuclear reactors to be built, and the safe production and utilization of atomic energy generated by those facilities, is hardly open to debate. See, e.g., 42 U.S.C. §§ 2012(d) and (e), 2014(v) and (cc), 2039, 2073(c)(7), 2099, 2111, 2133(b) and (d), 2134(a) and (c), and 2232(a). See also Section 2 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5801.

the reasoning employed by the two circuit courts in those cases is clearly instructive here. In each instance, the judicial inquiry focused on the nature and scope of the congressional mandate in the Atomic Energy Act and found it to be wanting. See New Hampshire v Atomic Energy Commission, supra, 406 F.2d at 175; Cities of Statesville v Atomic Energy Commission, supra, 441 F. 2d at 976. Thus, the broad responsibility of the NRC to regulate the commercial development of nuclear energy so as to ensure adequate protection to the public health and safety was not regarded by the courts as a Commission license to assume watchdog control over every conceivable industry matter. In this regard, it is especially significant that the response to both New Hampshire and Cities of Statesville came in the form of Congressional action which expanded the reach of the Commission's authority into those precise areas which the federal courts had declared to be beyond the legislative prescription. [10]

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10 In New Hampshire, the First Circuit, after an extensive review of the Atomic Energy Act and its legislative history, denied plaintiff's efforts to force the Commission to consider thermal pollution consequences, concluding that "the Congress has viewed the responsibility of the Commission as being confined to the scrutiny and protection against hazards from radiation" (406 F.2d at 175). Enactment of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., expanded the Commission's regulatory responsibility to include consideration of environmental consequences resulting from nuclear energy development. See, e.g., Aeschliman v Nuclear Regulatory Commission, 547 F.2d 622 (D.C. Cir.

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A similarly clear direction from Congress is, we submit, exactly what is needed in the present circumstances before the NRC may intrude during the construction phase into the labor problems of contractors of utilities which have been issued a construction permit. It is simply not enough to point to the broad investigative powers of the Commission "to effectuate the purposes of the Act" (Section 161(o)), or to "assist * * * in its administration and enforcement" (Section 161(c)), as a sufficient legislative mandate for such agency action. Not surprisingly, where Congress has deemed it appropriate to vest in an administrative agency a watchdog authority over labor matters in order to protect employees against retaliatory measures, ostensibly aimed at silencing complaints about employer conduct, it has so stated in clear and precise terms. [11] The most recent instance of this direct

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1976); Natural Resources Defense Council v Nuclear Regulatory Commission, 539 F.2d 824 (2d Cir. 1976).

The Cities of Statesville decision confirmed that the Commission lacked authority to consider antitrust consequences of the grant of a Section 104(b) license, even where that license was issued to a public utility contemplating the construction and operation of a large-scale, baseload nuclear generating plant. Thereafter, the Atomic Energy Act was amended so that only a Section 103 license could be issued in such circumstances, making antitrust review with respect to such applications mandatory. See 42 U.S.C. §§ 2131-2135 (1970 and Supp V. 1975).

11 See, e.g., section 201(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815; section
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Congressional approach to the concern over discriminatory treatment of employees is found in the Powerplant and Industrial Fuel Use Act of 1978, passed by the Senate on July 18, 1978, and by the House on October 15, 1978. [12] Section 743 of this new legislation delegates to the Secretary of Energy the responsibility to investigate and, on request, to hold public hearings "on behalf of any employee who is discharged or laid off, threatened with discharge or layoff, or otherwise discriminated against * * *."

No such provision is contained in the Atomic Energy Act. [13] Nor does the Energy Reorganization Act of 1974 include

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312(a) of the Clean Air Act Amendments of 1977, 42 U.S.C. § 7622; section 703 of the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1293; section 1450 of the Safe Drinking Water Act, 42 U.S.C. § 300j-9; section 507 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1367; section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660; section 15(a)(3) of the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3); section 8(a)(4) of the National Labor Relations Act, 29 U.S.C. § 158(a)(4).

12 This new legislation, identified as H.R. 5146, is set forth in full in Senate Conference Report No. 95-988, 95th Cong., 2d Sess.; the pertinent provision, Section 743, appears at p. 59 thereof. We are providing herewith a copy of Senate Conference Report No. 95-988 for the convenience of the Board. Our best information is that H.R. 5146 is currently before the President awaiting his signature; the President must act on or before November 11, 1978 to prevent a pocket veto of the bill. We will separately advise the Appeal Board by letter of the President's decision as soon as it is learned.

13 There is nothing in the legislative history of the Atomic Energy Act which clearly supports
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a direction to the NRC to involve itself in labor relations

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or negates the opposing positions regarding the present question of legal authority. The only references to labor matters which we have been able to find in the hearings and debates on the Atomic Energy Act of 1954 are the repeated urgings of Representative Holified from California that a Labor-Management Advisory Committee be established to provide assistance to the Atomic Energy Commission. See 100 Cong. Rec. 5300 (April 27, 1954); see also Hearings on S. 3323 and H.R. 8862 to Amend the Atomic Energy Act of 1946 Before the Joint Committee on Atomic Energy, 83d Cong., 2d Sess. 16, 23 (1954). The American Federation of Labor adopted a similar view in its testimony on the proposed legislation before the Joint Committee. See id. at 277-81 (testimony of Andrew J. Biemiller). Nevertheless, at the conclusion of the Joint Committee's hearings, no provision on labor-management relations was included in the committee bill.

This omission caused Representative Holified along with Representative Price to file separate views on the bill, highlighting the absence of any provisions on labor-management relations. See S. Rep. No. 1699, 83d Cong., 2d Sess. 132-33 (1954). When the bill came to the floor of the House, Representatives Holifield and Shelly proposed that it be amended to create a Labor-Management Advisory Committee to "advise the [Atomic Energy] Commission on all matters relating to labor-management relations in atomic energy plants and facilities owned or licensed by the Commission * * *". See 100 Cong. Rec. 10395-96, 10398, 11061-62 (July 19 & 23, 1954). This proposed amendment was voted down by the entire House of Representatives (id. at 11062).

While we do not suggest that this legislative history is dispositive of the issue at hand, we do take some comfort in the fact that in the only instance where the issue of Commission oversight of labor-management relations was faced, Congress explicitly declined to include such responsibilities within the statutory authorization of the Atomic Energy Act.

matters of the sort at issue here. [14] In fact, Congress has recently made it abundantly clear that this is not an area of responsibility it intended for this agency. In the new NRC authorization legislation (S. 2584) -- passed by the House on October 14, 1978 and by the Senate on October 15, 1978, and signed by the President on November 1, 1978 -- the matter of "employee protection" is specifically addressed. [15] There, the

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14 Arguing otherwise below, the Intervenor made reference to Section 206(d) of the Energy Reorganization Act of 1974 insofar as it authorizes Commission action "to insure compliance with the provisions of this section" (42 U.S.C. § 5846(d)). But, this provision does no more to advance the argument that the present NRC labor investigation is authorized by statute than do the referenced sections of the Atomic Energy Act. Just as Sections 161(c) and (o) of the Atomic Energy Act depend on a specific delegation of authority elsewhere in the statute in order for the Commission to exercise its broad investigative powers in furtherance thereof, so, too, Section 206(d) of the Energy Reorganization Act depends on "the provisions of this section". As is readily apparent from a review of Section 206, Commission activity under this provision relates explicity to the discovery of safety defects or hazards in the design or construction of a nuclear facility or its component parts. Insofar as the NRC has undertaken investigations into such matters, it is readily agreed by the parties that its efforts "have not [been] obstructed". See Stipulation at ¶ 4. However, the present NRC investigation into the causes of William Smart's firing concerns a far different type of inquiry -- one that falls well outside the contemplation of Section 206(d) of the Energy Reorganization Act of 1974.

15 The text of S. 2584 is set forth in House Conference Report No. 95-1796, 95th Cong., 2d Sess.; the pertinent amendment, new Section 210, appears at pp. 5-7 thereof. We are providing herewith a copy of House Conference Report
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Energy Reorganization Act of 1974, is amended by adding a new Section 210, which directs employees of licensees (or their contractors or subcontractors) to take their grievances relating to any discharge decision or other alleged discriminatory disciplinary action to the Secretary of Labor for investigation and a hearing, not to the NRC.

In light of this clear Congressional direction, it would be anomalous indeed to sweep within the broad language of Sections 161(c) and (o) of the Atomic Energy Act a duplicative investigative function to be performed by the NRC as to labor disputes arising during the course of construction at an authorized nuclear reactor site. The touchstone for such a reading of these particular provision was, in the Licensing Board's view, that involvement in labor matters of this sort could be justified in the name of public health and safety.

This misguided conclusion simply fails to withstand

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No. 95-1796 for the convenience of the Board. This legislative material can properly be officially noticed by the Appeal Board in connection with its consideration of the present appeal. While Union Electric urged the Licensing Board to receive and consider S. 2584 (see Letter of Counsel to Licensing Board dated September 21, 1978), the Licensing Board refused to do so on the ground that the bill was "beyond the scope of this opinion" (I.D. at p. 21). This ruling was, we submit, clearly in error; in any event, it suggests no basis for the Appeal Board declining now to take cognizance of this newly enacted legislation.

careful analysis. A review of the causes underlying an employee's discharge is not compelled by any safety consideration at the Callaway site. Plainly, such a labor investigation is unnecessary as a function of the NRC's overview of the design and construction of the nuclear facilities. That watchdog responsibility is being competently performed by NRC inspectors who continue to make regular examinations of the Callaway site while work is in progress. No impediments have even arguably been placed in the way of these frequent investigations, which include thorough NRC review of all alleged safety problems (including Mr. Smart's complaints) as well as prescribed corrective measures when necessary (see n.4, supra). In addition, the Commission will, of course, undertake a detailed evaluation of the site work now underway at the time that Union Electric Company seeks to obtain operating licenses for each of the two nuclear units. As the members of this Appeal Board know full well, before those licenses can issue, it must be demonstrated to the satisfaction of the NRC that the facilities are structurally sound and that the quality control and quality assurance programs have been fully satisfied.

There is, therefore, no legitimate reason for concern that the overriding Congressional interest in public health and safety in connection with the design and construction of

nuclear power plants is not being adequately attended to in the present case because the NRC cannot look into the causes of Mr. Smart's discharge. Moreover, even on the assumption, as pressed by the NRC Staff and the Intervenor below, that the disciplinary action taken here could perhaps have a "chilling effect" on other workers -- who, before the firing of Mr. Smart, might have been inclined to alert the NRC to alleged safety concerns which they believed existed and needed correction -- there exists no persuasive reason for the NRC to become embroiled in this labor dispute.

The existence or non-existence of such a "chill" can be easily ascertained by the NRC without undertaking to arbitrate the employee-discharge decision. It is uncontested that agency inspectors at the site remain free to talk with other construction workers to ascertain what impact, if any, Mr. Smart's firing may have had on their inclination to pass along their alleged safety concerns to the NRC (see p. 7 supra).[16] In this connection, the actual causes for the

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16 We cannot let the NRC's claim of "chill" pass without at least voicing our strong dissent. Any worker at the Callaway construction site is perfectly free to make safety allegations directly to the NRC on an anonymous basis, and the NRC is authorized to protect the anonymity of "whistle blowers" against public disclosure. See T. V. Tower, Inc. v Marshall, 106 Wash. L. Reptr. 481 (D.D.C. 1978). To this end, notices have been posted at the construction site pursuant to 10 C.F.R. Part 20, giving the telephone number of the Office of Inspection and Enforcement, Region III, and pointing out that the number can be called 24 hours
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disciplinary action taken (which have been determined in due course in the union grievance proceedings [17]) are not nearly so important as what other workers perceive to be the underlying reason for the firing. It is those perceptions, whether they be well-founded or ill-conceived, which arguably bring into focus the "public health and safety" concern of the NRC Staff that confidential sources of information relating to real or suspected safety problems will "dry up" as a result of the firing.

We do not challenge here the ability of the NRC to devise corrective measures to counteract such a development if a "chill" is indeed found to exist. Nor have any roadblocks been placed in the way of agency efforts to determine on its own whether its informants at the site have been silenced by

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a day, collect. Moreover, the regular and frequent site inspections by NRC personnel provide workers with another means of direct access for purposes of privately registering safety complaints.

Accordingly, there is little, if any, reason to suspect that the discharge of Mr. Smart -- who chose to make known his "whistle blowing" activities -- should chill others from alerting the Commission of possible safety concerns. Perhaps it can be said that the construction workers at the Callaway site have been "chilled" by Mr. Smart's firing from revealing the fact that they have spoken with the NRC. However, this sort of "chill", which tends, at most, to encourage anonymity, suggests no cause whatsoever for a reluctance to continue to register complaints with the NRC privately.

17 See n. 5, supra.

Mr. Smart's release. However, there is no need for an independent, parallel investigation by the NRC into the causes of the firing in order to identify and deal with a claim of "chill". Nor is any statutory purpose under the Atomic Energy Act served by now thrusting the NRC into such labor relations matters where the agency understandably lacks the expertise required to resolve employer-employee disputes.

This is, we submit, dispositive of the present Show Cause proceeding. To the extent it might be argued -- albeit tenuously in light of the new NRC authorization legislation (S. 2584) -- that the absence of a specific legislative directive in this area is due to Congressional oversight, such gaps in the NRC's statutory mandate are obviously for Congress to fill, not the Commission or the courts. See, e.g., Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, 435 U.S. 519, 98 S. Ct. 1197, 1219 (1978). Accordingly, the Licensing Board's references to the broadly framed regulatory language contained in Rule 50.70 of the Commission's Regulations (10 C.F.R. § 50.70) -- which parrots the statutory provision in section 161(o) permitting Commission inspections and investigations "to effectuate the purposes of [the] Act" -- provide no cure to the jurisdictional defect in the present case.[18] Just as its legislative counterpart (see pp. 10-16,

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18 Similarly unavailing are the non-discrimination provisions contained in Part 4 of the Commission's Regulations (10 C.F.R. Part 4). Those regulations (continued next page)

supra), the operation here of that regulatory guideline depends on a clear indication from Congress that labor arbitration is one of the intended responsibilities of the NRC. Thus far, Congress has not seen fit to assign such a role to the Commission. [19]

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pertain to "any program for which Federal financial assistance is authorized under a law administered by the NRC" (10 C.F.R. § 4.2). As such, we have little doubt that they have a firm statutory basis under Title VI of the Civil Rights Act of 1964 (see 10 C.F.R. § 4.1). That legislation does not, however, provide a vehicle through which the Commission can assert authority to take the action it is considering here. Construction of the Callaway nuclear facilities is not a federally funded project, and the permit issued by the NRC authorizing site work did not provide for federal financial assistance. Accordingly, an investigation into the circumstances of the firing of William Smart such as the NRC is now proposing cannot possibly be premised on Part 4 of the Commission's Regulations.

19 In this regard, it should be noted in passing that there exists, in our view, serious question as to the statutory underpinning for the non-discrimination provision contained in Rule 19.16(c) of the Commission's Regulations (10 C.F.R. § 19.16(c)). It is not without significance that the statement of consideration accompanying Part 19, 38 Fed. Reg. 22217 (August 17, 1973), discloses that this particular regulation was patterned after the Occupational Safety and Health Administration regulations, specifically 29 C.F.R. Part 1903. However, OSHA's statutory charter explicitly provides for the non-discrimination provision incorporated in the referenced OSHA regulations. See Section 11(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c). By contrast, as we have already demonstrated, no similar legislative authorization exists in the Atomic Energy Act. We do reocgnize that this defect may well have been cured with the recent passage of the NRC authorization legislation amending the Energy Reorganization Act in terms similar to the
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II. THE NRC FAILED TO FOLLOW PROPER PROCEDURES IN ITS EFFORT TO INITIATE AN INVESTIGATION OF THE INSTANT LABOR MATTER

There is, in our view, yet another strong reason why Daniel Construction should not be faulted for refusing to permit NRC inspectors to examine its records of the firing of Mr. Smart or to interrogate company personnel regarding this matter. At the present time, the Commission has no procedures whatsoever for undertaking any sort of investigation of labor problems that might arise during the course of construction at a nuclear plant site. [20] In view of the absence of any

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non-discrimination provision contained in the Occupational Safety and Health Act of 1970.

In view of the fact that Rule 19.16(c) has no conceivable applicability to the instant inquiry, there is no need to give it any further attention here. We would simply point out that, even if there exists proper statutory authority for this regulation, it plainly has reference only to those "licensed to operate a * * * utilization facility" or licensed to "receive, possess, use or transfer material licensed by the [NRC] * * *" (10 C.F.R. § 19.2). Unquestionably, Daniel Construction is not within this class; nor is there any prospect that this contractor ever will be such a licensee. Indeed, Union Electric is not even a covered licensee within the meaning of Part 19 of the Commission's Regulations at the present time.

20 The two non-discrimination provisions contained in the Commission's Regulations, 10 C.F.R. Parts 4 and 19, pertain to different situations than the one at hand and have no application to the present inquiry

indication from Congress that such matters are a legitimate area of Commission concern, and the NRC's own silence on the subject in its regulations (see p. 9, supra), Daniel Construction had no notice at the time it entered into a construction contract with Union Electric Company (or thereafter) that its participation in the Callaway project effectively required the surrender to NRC inspectors of company employee records on request.

This lack of notice cannot be lightly dismissed. While Daniel Construction could fully anticipate that its reports and records pertaining to site work and safety considerations would have to be made readily accessible for regular inspection and review by the NRC (see 10 C.F.R. § 50.55(e)) -- and, indeed, such has been the case -- it also properly retained a reasonable expectation of privacy as to other unrelated company records, including those dealing with labor matters and disciplinary action taken against its employees. In circumstances where such an expectation of privacy was not nearly so clear -- due to existing language in the Occupational Safety and Health Act (see 29 U.S.C. § 657(a)), and also in the implementing OSHA regulations (see 29

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(see nn.18 & 19, supra). Moreover, neither of those regulations sets forth procedures to be followed by the NRC in investigating the proscribed conduct.

C.F.R. Part 1903), both of which authorized entry and investigation by OSHA inspectors -- the Supreme Court of the United States just recently condemned government efforts to investigate a business premise without first obtaining a warrant to safeguard against impermissible intrusions on Fourth Amendment rights of privacy. See Marshall v Barlow's, Inc., 436 U.S. 307, 98 S. Ct. 1816 (1978).

The NRC certainly should not be afforded any greater liberties with respect to the investigation it is seeking to conduct here. Even assuming arguendo that Congressional authorization for such action could, for the first time ever, be found in this proceeding to exist in the more general language of the Atomic Energy Act -- a conclusion which we believe to be untenable for the reasons already stated -- an inquiry by the NRC into the circumstances surrounding the firing by Daniel Construction of one of its workers would remain, at best, on the outer fringes of Commission authority (see pp. 8-22, supra). By contrast, the inspection at issue in Barlow's, Inc. was a well established agency practice, undeniably central to OSHA's statutory mandate -- i.e., an inspection of safety hazards and violations of the OSHA regulations (see 436 U.S. at ____; 98 S. Ct. at 1818). If a warrant is demanded to protect privacy rights in the latter instance (where both Congress and the agency have so clearly

put the public on notice of the possibility of entry and investigation in accordance with regulatory guidelines), it necessarily follows that similar procedural safeguards must first be employed by the NRC in the former situation (where neither statutory notice nor administrative regulations exist to alert utilities and their contractors of a possible intrusion into labor matters heretofore reasonably believed to be beyond NRC scrutiny).[21]

The Licensing Board dismissed this argument by a cryptic reference to the Supreme Court's recognition in Barlow's, Inc. of an exception to its warrant requirement where the agency inspection takes place in certain industry situations distinguished by "a long tradition of government supervision" (436 U.S. at ____, 98 S. Ct. at 1820-21). Such a

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21 The warrant requirement discussed in Barlow's, Inc. is intended to protect the privacy and security of persons against arbitrary agency invasions of Fourth Amendment interests. We believe that, if Congress were to authorize the NRC to undertake a role in the area of labor relations, the same protection could be guaranteed in the present circumstances under the Commission's subpoena power (10 C.F.R. § 2.720). If examination of employee records and interrogation of company personnel on labor relations matters were required by Commission regulation to be undertaken pursuant to subpoenas, the target of the investigation and its employees would then have ample opportunity to contest in advance the propriety of such an agency investigation as unauthorized or unwarranted in the circumstances, or to challenge its scope as being impermissibly broad.

response misreads the referenced decision. In the two cases relied upon by the Court for this proposition, United States v Biswell, 406 U.S. 311 (1972) (firearms industry), and Colonnade Catering Corp. v United States, 397 U.S. 72 (1970) (liquor industry), an integral part of the "government supervision" provided for by statute permitted official entry upon the premises of dealers for the explicit purpose of inspecting the inventory as well as all company records. See, e.g., Gun Control Act of 1968, 18 U.S.C. § 923(g); Internal Revenue Code, 26 U.S.C. §§ 5146(b) and 7606. Warrantless searches in such circumstances were regarded as reasonable under the Fourth Amendment in large part because unannounced investigations were viewed as essential to the effective enforcement of the relevant statutes -- to protect against fraud and concealment of illegal firearms and liquor that might otherwise go undetected if inspections depended upon first obtaining a warrant. See United States v Biswell, supra, 406 U.S. at 316; Colonnade Catering Corp. v United States, supra, 397 U.S. at 75-76.

No such reasoning could possibly be applied to sustain a warrantless investigation of labor practices by the NRC in the present context. As pointed out earlier, investigations of this nature, to the extent they could arguably be considered on the periphery of the Commission's

authority (which we dispute), are plainly not necessary to the effective enforcement of the Atomic Energy Act (see pp. 17-21, supra). Certainly, the element of surprise deemed important to detect fraud and concealment of unlawful firearms or liquor is not essential to gain access to employee records and company personnel for purposes of reviewing the circumstances surrounding the firing of a construction worker. Accordingly, a warrant requirement of the sort announced in Barlow's, Inc. cannot be sidestepped here on the basis of the principal rationale used to allow such a result in Biswell and Colonnade Catering.

There is, moreover, another forceful reason why the two cases last mentioned do not support abandonment of procedural safeguards in the present context. As the Supreme Court observed in Barlow's, Inc., the existence of pervasive regulation in the firearms and liquor industries eliminated entirely any reasonable expectation of privacy on the part of dealers operating in those businesses. To borrow from the Court's opinion: "when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation" (436 U.S. at _____; 98 S. Ct. at 1821).

In many respects, we would have to concede that the comprehensive regulation of the electric utility industry

places utilities, and perhaps their construction contractors, in much the same posture with respect to those activities heretofore regulated by state public utility commissions, the Federal Energy Regulatory Commission, and the NRC. Recognition of this fact, however, does not permit the NRC to ignore for all purposes the Supreme Court's ruling in Barlow's, Inc., especially when embarking on an area not previously viewed as within the NRC's regulatory ambit. Even accepting for the present the statement in Almeida-Sanchez v United States, 413 U.S. 266, 271 (1973), that "[t]he businessman in a regulated industry in effect consents to the restrictions placed upon him", [22] the central factor giving rise to the present controversy remains unassailable: i.e., neither Congress nor the Commission has yet prescribed labor relations matters of the sort involved here as properly being within the area of Commission regulation.

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22 We tend to believe thast such a view ha much greater application to Union Electric Company than to Daniel Construction, which is an independent contractor not generally subject to the pervasive regulation of the NRC. However, as already noted (see p. 24, supra), insofar as the safety of design and construction of the Callaway facilities is concerned, we cannot reasonably maintain that Daniel Construction stands on a different footing than Union Electric Company with respect to the extent of the Commission's regulatory controls. Our position is simply that we can find no statutory or regulatory basis for using such recognized NRC authority as a vehicle for bootstrapping the NRC into a supervisory position over the entirely separate matter of Daniel Construction's labor practices with respect to employees working at the construction site.

Even if this Appeal Board were ultimately to agree with the Licensing Board's determination that the broad mandate in the Atomic Energy Act somehow bestows upon the NRC authority to act in this area, it cannot at this time be disputed that the Commission thus far has chosen not to address labor relations matters in its Rules of Practice. Until the NRC undertakes to promulgate regulations specifying that labor practices of utilities and their contractors may in prescribed circumstances be investigated by NRC inspectors, and delineates the procedures to be followed in carrying out that directive, neither the Fourth Amendment nor judicial precedent condone warrantless investigations by this agency of labor practices during the construction phase of the NRC licensing process as being a permissible exercise of agency authority. The expectation of privacy which may well have been surrendered, in part, with respect to records and reports on site work and safety considerations (see 10 C.F.R. § 50.55(e)) still has continuing vitality, even in regulated industries, where the area of possible inquiry falls outside the bounds of existing regulation.

It is our firm belief that such a situation is squarely presented here. Accordingly, the request of NRC inspectors to examine the records and personnel of Daniel Construction for purposes of investigating William Smart's

firing, unaccompanied by warrant or subpoena, was properly refused. To fault the company for such action would be tantamount to turning the Supreme Court's careful decision in Barlow's, Inc. on its head and to read the exception as swallowing up the rule. The Court itself expressly rejected such an argument (see 436 U.S. at ____; 98 S. Ct. at 1820-22), and no legitimate reasons exist for the Licensing Board responding in a different manner.

III. ANY LABOR INVESTIGATION WHICH THE NRC MIGHT BE AUTHORIZED TO MAKE SHOULD IN ANY EVENT AWAIT THE OUTCOME OF PARALLEL GRIEVANCE PROCEEDINGS TO BE CONDUCTED BY THE SECRETARY OF LABOR

Union Electric Company argued below that the NRC should be directed to delay its investigative efforts regarding William Smart's firing in the event that the Licensing Board determines that such action is statutorily authorized and can properly be undertaken (without warrant or subpoena) prior to the promulgation of regulatory guidelines in the area of labor relations. As earlier noted, at the time of the Licensing Board's deliberations, separate grievance proceedings initiated under the Project Agreement between Daniel Construction and the involved unions were already underway and had progressed through the first five prescribed stages to the final step of

binding arbitration (see n.5, supra). In light of this development, it was our view that the appropriate course for the NRC to follow, if Commission action was found to be authorized, would be to defer its investigation until completion of the ongoing union grievance proceedings.

On November 1, 1978, those proceedings concluded with a decision by the designated arbitrator ordering the reinstatement of William Smart with back pay (see n.5, supra). For present purposes that removes from this appeal the specific question of deferral raised by the parallel union investigation that had been initiated prior to any action by the NRC. [23] However, in light of the recently passed amendment to the

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23 We readily agree that, with the issuance of the arbitrator's decision, no good reason remains in this case for the NRC to stay its hand if this Appeal Board decides that its requested investigation is authorized. However, we seriously question the need for such a duplicative effort now that Mr. Smart has been awarded reinstatement and back pay. In this regard, we cannot help but observe once again how far removed the NRC's proposed labor investigation is from any legitimate public health and safety concerns in connection with the Callaway construction activity. If the firing of Mr. Smart did in fact cause a "chill", as alleged, his full reinstatement by the arbitrator should certainly result in a rapid thaw. We suspect the alleged "chill" would have evaporated as quickly if the decision by the arbitrator had gone the other way, and found Mr. Smart's firing to have been fully warranted because of employee disobedience. In short, as already explained in an earlier section of this brief, there plainly was no need for investigative action in this area by the NRC to effectuate or preserve any statutory purpose within the meaning of Sections 161(c) and (o) of the Atomic Energy Act.

Energy Reorganization Act (see n.15, supra), which assigns to the Secretary of Labor primary responsibility for investigating employee discharges or other disciplinary action taken by licensees and their contractors or subcontractors, there still remains a need for this Appeal Board to speak to the deferral issue if, contrary to our position here, it finds NRC action in the labor relations area also to be authorized.

Strong policy reasons argue forcefully in favor of deferring labor investigations by this agency in order to allow the Secretary of Labor a full opportunity to inquire into contested disciplinary action against construction workers at an authorized nuclear reactor site. The NRC understandably lacks exposure to the delicate considerations that are an integral part of labor arbitration. It certainly is no disparagement of the Commission to point out that it has no special expertise in the labor relations field, which involves practices, procedures, customs and rules just as specialized as nuclear engineering. It therefore makes good sense for the NRC to leave in the first instance to those versed in such matters the difficult judgments that must be made on such questions as: What is the practice in the construction field for terminating workers? Is that practice reasonable in the circumstances? Is the failure of an employee to obey an order from his foreman sufficient ground for termination? Was the particular

dismissal that is being challenged in any way distinguishable from other dismissals on the designated project? What authority should a foreman have on a construction job of the magnitude involved in building a nuclear reactor? What recourse should be available to the dismissed worker, and in what circumstances?

Indeed, if the NRC were to undertake a parallel investigation and make its own findings on such issues, it would not only put itself into the potentially "incongruous situation" of deciding the matter in a way which conflicts with the decision ultimately reached in ongoing grievance proceedings by those more expert in resolving labor disputes of the sort in question (cf. United States v Willard Tablet Co., 151 F.2d 141 (7th Cir. 1944)). Equally troublesome, it would also likely cause a serious disruption of pending hearings by the Secretary of Labor. For example, if the NRC were to complete its investigation first, and find that the challenged disciplinary action was entirely justified, the worker and his union would undoubtedly complain that the decision by this agency unfairly prejudiced the outcome of the parallel proceedings being conducted by the Secretary of Labor. A similar complaint by the contractor could be expected if the NRC reached the opposite conclusion.

A policy of deferral removes these prosepcts of potential conflict and possible interference with the review

process prescribed in the amendment to the Energy Reorganization Act. Furthermore, it permits the labor dispute to be resolved initially where it should be, in a labor-management forum. Beyond this, we believe deferral has the added advantage in a broader perspective of placing construction workers on notice that the NRC does not intend to allow its investigative role in this particular area to be misused to frustrate legitimate disciplinary action. In this regard, if it is known that the NRC is amenable to allowing established grievance procedures to proceed uninterrupted to completion, there is much less likelihood that a worker will undertake to register frivolous or fabricated safety complaints with the Commission simply to embroil the NRC in all management decisions affecting his employee status (whether it be a salary adjustment, disciplinary action, job assignment or outright dismissal).[24]

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24 If, as a recognized "whistle blower", a worker could be sure of involving the NRC in all disciplinary actions taken against him, there could well develop a strong incentive among construction workers at an approved reactor site to make safety complaints to the NRC, no matter how irresponsibly conceived, simply to deter management from taking any such action, no matter how justified. This misuse of the NRC investigatory process would lead to a needless waste of time and money by the Office of Inspection and Enforcement in "chasing down" unfounded safety complaints by workers intent only on insulating themselves from management discipline. In addition, to the extent the employer refused to allow such tactics by his employees to alter his

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For all of these reasons, if the Appeal Board should decide that the NRC has authority to assume a new role as labor investigator with respect to disciplinary action taken by management against workers at a construction site who have complained to the Commission about safety problems, we would urge that the Board direct the NRC to defer looking into such matters on its own in light of the new investigative responsibilities assigned to the Secretary of Labor in this area. Whether the complaining employee ultimately prevails in the prescribed labor hearings under section 210 of the Energy Reorganization Act, as amended, or conversely, it is there determined that his discipline was for good cause and nondiscriminatory, the NRC's interest in the outcome of the labor dispute, such as it might be, will plainly have been satisfied (see n.23, supra). The Commission certainly can then devise, on the basis of the informed decision by the Secretary

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labor decision, the NRC could well be inundated with time-consuming investigations into such matters. Conversely, where the employer elects to tolerate the indiscretions of "whistle blowing" employees to avoid another costly and timely NRC proceeding, discipline at the construction site will obviously suffer, with a concomitant erosion in the expected high level of performance by nuclear plant construction workers.

A policy by the NRC of deferring in the first instance to established grievance procedures announced by the Secretary of Labor for purposes of investigating labor disputes that arise during construction of a nuclear facility would, in our judgment, effectively remove the above concerns.

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of Labor, whatever additional measures (if any) it believes are needed to counteract a perceived "chill" on the reporting activities of workers at the site. This provides an ample safeguard against the expressed concern that an employee's termination could, if viewed by his co-workers as attributable to his complaints to the NRC, possibly "dry up" valuable sources of information concerning the safe design and construction of a nuclear power plant.

V. NO CAUSE HAS OR CAN BE SHOWN IN THIS CASE FOR SUSPENSION OF UNION ELECTRIC'S CONSTRUCTION PERMITS FOR THE CALLAWAY PLANT

The Licensing Board, having concluded (albeit erroneously) that the NRC investigation here in question was authorized by statute in furtherance of the public safety, harshly condemned as "intolerable" (I.D. at p. 20) the refusal of Union Electric Company and Daniel Construction to grant the NRC inspectors access to company records and personnel for purposes of the referenced inquiry. On this basis, the Board below ruled "that the drastic remedy of suspension of the construction * * * [permits] is required" until the investigation is allowed to take place (I.D. at pp. 20, 22). [25]

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25 As we have heretofore pointed out (see n.1, supra), by agreement of the parties the authority granted to the Director, Office of Inspection and Enforcement, in the Initial Decision to suspend Construction Permits Nos. CPPR-139 and CPPR-140, is not to be exercised during the pendency of this appeal and for fifteen days following issuance of the Appeal Board's decision.

This result is legally wrong even assuming that an NRC investigation into the causes of William Smart's firing is fully warranted. Significantly, the stipulated facts in the present case clearly establish that this labor-management dispute raises no health and safety concerns with respect to the Callaway construction work that was the subject of William Smart's complaints. See Stipulation ¶ 4. [26] Nor is it disputed that no barrier of any sort has been placed in the way of the Commission investigating any and all allegations of unsafe work made by any worker employed by Daniel Construction or Union Electric Company (see p. 7, supra). Similarly, NRC inspectors remain free to inquire openly or privately into the matter of an alleged "chill" at the construction site as a result of the instant discharge decision (see n.6, supra). In these circumstances, the drastic remedy of an immediate suspension is simply not an appropriate sanction to be imposed by the Commission.

This conclusion is inescapable under the prior relevant decisions of this agency. In every reported case on

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26 Indeed, the complaints raised by William Smart have been the subject of a series of NRC investigations by the Office of Inspection and Enforcement, Region III, and, as stipulated by counsel for all parties hereto (including Mr. Smart), those investigations did not disclose any circumstances warranting suspension of the construction permits. See Stipulation ¶ 4; and see William Smart's Agreement to Stipulation, p. 1.

point, some "substantial" health and safety issue has been the touchstone of a suspension order issued in a show cause proceeding. See, e.g., Consolidated Edison Company (Indian Point, Units 1, 2 and 3), CLI-75-8, 2 N.R.C. 173, 176 & n.2 (1975); Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-315, supra, 3 N.R.C. at 110-12; Virginia Electric & Power Company (North Anna Power Station, Units 1 and 2), LBP-75-54, 2 N.R.C. 498, 537 (1975), aff'd as to this issue, ALAB-324, 3 N.R.C. 347, 389 (1976). There exists no plausible ground for a departure from that guiding principle in the present case.

Indeed, the posture of the instant show cause proceeding argues forcefully against the issuance of a suspension order. Such a result is, by both statue and regulation, permissible only insofar as certain proscribed conduct can be shown to have occurred. See 42 U.S.C. § 2236(a); 10 C.F.R. § 50.100. To the extent that such conduct could conceivably be found to exist in this case, the only language remotely relevant to the present inquiry allows for suspension "for violation of, or failure to observe, any of the terms and provisions of this Act or of any regulations of the Commission" (42 U.S.C. § 2236(a)). [27]

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27 This is the last of four grounds listed in the statute as a basis for suspension. The other three grounds are: (i) "for any material false statement"; (ii) "because of conditions revealed by * * * any report, record, or inspection or other means, which would warrant the Commission to refuse to grant a license on an original application"; and (iii) "for

However, reliance on this language would, we submit, be misplaced in the present context. Should this Appeal Board disagree with the position we have articulated above, its permission for the NRC to undertake labor investigations with regard to disciplinary action against construction workers at an approved nuclear site would establish a new principle of law as to an issue of first impression, the resolution of which was not clearly foreshadowed by prior Commission policy or practice. We have already stated our views as to why Daniel Construction's challenged action cannot be faulted under the Atomic Energy Act or the Commission's regulations. It would be harsh indeed, in light of our understanding of the NRC's scope of authority (see pp. 8-22, supra), and the procedural safeguards that generally must accompany administrative

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failure to construct * * * a facility in accordance with the terms of the construction permit * * *." These obviously have no application to this case.

The same four grounds are also found in Rule 50.100 of the Commission's Regulations (10 C.F.R. § 50.100). We should point out, however, that, as to the fourth ground, the regulatory formula differs from the above-quoted language in the statute in that it has been expanded to read a "violation of, or failure to observe, any of the terms and provisions of the act, regulations, license, permit or order of the Commission" (10 C.F.R. § 50.100). For present purposes, this distinction between the statute and the regulation is insignificant, since there is no suggestion here that Daniel Construction's response to the NRC inspectors violated any terms and provisions of Construction Permits CPPR-139 and CPPR-140 or ran counter to any Commission order.

investigatory efforts (see pp. 23-31, supra), to condemn the refusal of access in this case as a knowing and willful violation of, or disregard for, the statute and regulations. [28]

In fact, any such response to the good faith, and entirely legitimate, efforts here by Union Electric Company and Daniel Construction to contest what they honestly believe to be unauthorized and impermissible NRC action could well have an undesirable, chilling impact on similar challenges in the future. Utilities will undoubtedly be far more reluctant to bring to the attention of the Commission perceived excesses of agency authority if they are to anticipate forfeiture of their permits or licenses in the event that their reasonable objections are ultimately not sustained. To cast such a pall over the NRC review process runs directly counter to the requirements of section 9(b) of the Administrative Procedure Act (5 U.S.C. § 558(b)) -- which has been made expressly applicable to Commission proceedings by section 186 (b) of the

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28 Where it can be shown that a utility has acted in a willful and knowing or deliberate manner to evade its responsibilities, punitive action, including license suspension, might well be warranted as a prophylactic measure against similar violations in the future. Such reasoning plainly has no application here. In the past, the absence of a "concerted, deliberate intention" to violate the Act has led a licensing board to conclude that suspension was an inappropriate remedy. See Virginia Electric & Power Company (North Anna Power Station, Units 1 and 2), LBP-75-54, supra, 2 N.R.C. at 536-37.

Atomic Energy Act. See 42 U.S.C. § 2236(b). Except in certain special cirumstances not applicable here, the referenced provision of the APA recognizes as lawful agency suspensions of licenses or permits only after the holder thereof "has been given * * * (2) opportunity to demonstrate or achieve compliance with all lawful requirements".

The clear thrust of the language just quoted is that one in possession of construction permits, such as Union Electric Company, must be informed prior to a suspension order of the precise bounds of the "lawful requirements" to be met, and afforded an opportunity to comply therewith. In order to satisfy this statutory mandate, we think it is incumbent upon this Appeal Board -- in light of the absence of any statutory or regulatory guidelines in this area -- to set forth in its decision, should it disagree with our position, the nature and scope of the legal obligation of a utility and its contractor when confronted with a request by NRC inspectors to initiate a labor investigation into management's decision to fire an employee at the construction site. Only after those newly formulated "lawful requirements" have become a final order of the Commission, and opportunity has been given to Union Electric Company and Daniel Construction to "achieve compliance" therewith, would it then perhaps become appropriate under Rule 50.100 of the Commission's Regulations and section

9(b) of the APA to entertain a request for suspension of Construction Permits CPPR-139 and CPPR-140 on the ground that the requested investigation had been barred. To order such a sanction at this time in ruling on an issue of first impression is plainly premature, both as a matter of law and policy.

There is one final point to be made against an order of suspension in the present case. As the Commission has heretofore cautioned, so drastic a remedy carries with it serious repercussions which cannot be lightly dismissed. Thus, in Consumers Power Company (Midland Plant, Units 1 and 2), CLI-73-38, 6 A.E.C. 1082, 1083 (1973), the Commissioners wrote:

> Unwarranted suspension of construction of a needed generating plant is contrary to the public interest. Moreover, a period of enforced suspension of construction may result in layoffs and consequent hardship for employees at the site. And, obviously, an extended suspension may generate substantial additional costs which the consumers may ultimately bear through increased electricity rates.

See also Virginia Electric & Power Company (North Anna Power Station, Units 1 and 2), supra, 2 N.R.C. at 537 (need for power which that unit will provide to the public, as found in an earlier licensing proceeding, argues against suspension).

Concerns similar to those expressed in Consumers Power and VEPCO are equally applicable here. The need for the Callaway Plant has already been determined. See Union Electric

Company (Callaway Plant, Units 1 and 2), LBP-75-47, 2 N.R.C. 319 (1975), aff'd, ALAB-347, 4 N.R.C. 216 (1976). Suspension of the construction permits would obviously delay completion of this needed facility. Moreover, the delay will necessarily increase the cost of the plant, with a resulting increase in electricity rates to Union Electric's customers.[29] In addition, an immediate suspension would produce the anomaly that, as result of a good faith challenge by the licensee and its contractor to the NRC's authority to investigate the firing of a single construction worker at the Callaway Plant, the Commission has taken action which deprives all workers at the site of their jobs. No conceivable purpose is served by such an astonishing result.

Nor can we perceive that any possible harm will come to the Commission or to its regulatory scheme if a suspension order is not entered. Assuming that the Appeal Board should ultimately disagree with our position, and its direction to Union Electric Company to comply with this labor-management investigation should be accepted in a final Commission order, any act of non-compliance that might thereafter take place can at that time be offered as cause for sanctions, whether in the form of an authorization to suspend (which seems to us unduly

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29 See "Motion of Union Electric Company For A Stay Of Suspension Order Pending Appeal Board Review", dated October 6, 1978, and the Affidavit of John K. Bryan attached as Exhibit "A" thereto. (continued next page)

harsh), or, more reasonably in our view, in the form of an imposition of fines or even provision for resident inspectors at the site, with the added regulatory charges assessed against Union Electric Company. In this manner the integrity of the Commission's regulatory authority will be fully protected. There simply is no need to take precipitous suspension action now, especially when the full burden of such action falls on Union Electric Company, its customers, and the construction workers employed at the Callaway site, with no real benefit to the Commission or to the public interest served by the Commission's regulatory mandate.

CONCLUSION

For all of the foregoing reasons, Union Electric Company submits that the Licensing Board's Initial Decision On Order To Show Cause is in error in the several respects described above and must be reversed. NRC's involvement in labor relations matters of the sort presented in the present case is not authorized by statute, not contemplated by the Commission's own regulations, not accepted by the Supreme Court in the absence (as here) of fundamental procedural safeguards against government intrusions on privacy rights, and finally, not recommended as a matter of sound policy where there exist alternative procedures for an examination of the same

disciplinary action by recognized labor authorities having a greater degree of experience and expertise in the area of inquiry. Moreover, allowing suspension of Construction Permits CPPR-139 and CPPR-140 is wholly unwarranted in the circumstances.

Dated: November 8, 1978.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: 

Wm. Bradford Reynolds
Gerald Charnoff

Counsel for
Union Electric Company

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Union Electric Company's Brief In Support Of Its Exceptions To The Initial Decision" were served upon each of the following, delivering by hand to those persons in the Washington, D.C. area, and by first class mail, postage prepaid, to all others, all on this 8th day of November, 1978:

Alan S. Rosenthal
Chairman, Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Michael C. Farrar, Esquire
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Richard S. Salzman
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

James P. Murray, Esquire
James Lieberman, Esquire
Office of the Executive Legal Director
Washington, D.C. 20555

Michael H. Bancroft, Esquire
Diane B. Cohn, Esquire
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036

Fulton City Library
709 Market Street
Fulton, Missouri 62251

Atomic Safety and Licensing Appeal
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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By: 
Wm. Bradford Reynolds
Counsel for Union Electric Company