



Tennessee Valley Authority, 1101 Market Street, Chattanooga, Tennessee 37402-2801

February 2, 2000

Mr. Richard W. Borchardt, Director
Office of Enforcement
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2739

Dear Mr. Borchardt:

**DISCRIMINATION TASK GROUP EVALUATION OF NUCLEAR REGULATORY
COMMISSION (NRC) PROCESSES USED TO HANDLE DISCRIMINATION
ALLEGATIONS AND VIOLATIONS OF EMPLOYEE PROTECTION
REGULATIONS**

The Tennessee Valley Authority (TVA) is pleased to provide comments to the Discrimination Task Group as it evaluates NRC processes to handle allegations and enforcement actions related to violations of the NRC's employee protection regulations (10 CFR § 50.7). Representatives of TVA attended the Discrimination Task Group stakeholder meetings held in Washington, D.C. and Chattanooga, Tennessee. TVA has also worked closely with the Nuclear Energy Institute (NEI) and has participated on NEI's Task Force on this issue to communicate its ideas about how the employee protection regulations are being interpreted and enforced by NRC.

TVA supports NRC's efforts to assess its current practices associated with administering and enforcing Section 50.7. As a participant in NRC's process to obtain stakeholder input, representatives of TVA have had the opportunity to share experiences and perceptions about the complexities of this subject with the NRC staff, other utility representatives, counsel from various law firms which represent utilities, individual managers and workers, as well as workers who have alleged retaliation and individuals who were alleged to have retaliated. In all, this process has served both as a learning experience and a validation of the many concerns TVA has about NRC's current Section 50.7 investigation and enforcement process.

One of the clearest observations TVA came away with as a result of its participation in the stakeholder meetings is that no one is pleased with or supports the current manner in which NRC applies the employee protection regulations. TVA has also read the comments recently submitted by NEI, licensees, and law firms which pointed out a process that is fundamentally flawed and in need of significant reform. TVA is in strong support of the views and comments provided by NEI. In particular, TVA believes that the manner in which NRC currently interprets and enforces Section 50.7 is counterproductive.

This is not to say that TVA is critical of the important regulatory and policy interests that Section 50.7 seeks to protect. TVA has worked for many years to implement policies and programs to protect employee views and promote an working environment where each employee feels free to express any concern, safety-related or otherwise. TVA recognizes that the continued success of its nuclear program depends upon employee communications and the expression of views in everyday work settings. To that end, TVA conducts training and periodically reinforces the message to its employees that TVA must know about any potential or observed problems as early as possible so it can effectively and efficiently deal with them before they can affect operations. Our objective is to promote open communication and responsibility for finding and correcting problems. However, NRC's current implementation of the employee protection regulations goes beyond what is necessary to protect employees and the work environment and can adversely impact management's ability to ensure safe and efficient plant operations.

Many have spoken and written about firsthand experience with the Office of Investigations (OI) and its process for investigating allegations of retaliation. It is TVA's belief, through several direct experiences, that the commencement of OI's closed, adversarial process runs directly counter to achieving a shared, common understanding of the facts and effectively ends any hope of resolving an allegation of discrimination. As many have pointed out, this process has a profound negative effect on all who are subjected to it. In addition, the lack of openness and any articulation of standards by which the information is assessed undermine the credibility of the results. Add to this the fact that the process is usually untimely,¹ and one is left with no bases to warrant its continued practice.

¹ In an ongoing Section 50.7 enforcement action involving TVA, the protected activity occurred in 1993, and the alleged retaliation took place in 1996. OI's investigation and the Predecisional Enforcement Conferences were conducted in 1999. NRC issued a Notice of Violation (NOV) and Proposed Civil Penalty (CP) in February 2000. The day after the NOV/Proposed CP was issued, TVA requested the underlying OI Report and related exhibits. NRC sent redacted versions of the documents to TVA ten months later, in December 2000. TVA filed its response denying the NOV/Proposed CP in January 2001, and the matter is now pending before NRC for reconsideration.

NEI and others have also pointed out that the legal and evidentiary standards applied by the NRC in Section 50.7 matters is inadequate. TVA agrees. Recent cases involving TVA and others demonstrate a lesser standard of proof being used by the NRC to infer retaliatory motive based on knowledge of a protected activity. TVA does not wish to repeat that discussion here, but TVA is especially concerned that NRC's adoption of the present legal and evidentiary standards is counterproductive to the promotion of safety. As described more fully below, NRC's current regulatory approach allows an employee who has engaged in a protected activity to become a protected employee immune from any management decision they may perceive as adverse.

Section 50.7(d) serves important public policy interests. Specifically, it provides that protected individuals are not immune from employment decisions dictated by nonprohibited considerations. It also ensures that employers will be able to make employment decisions on the basis of performance, including job selections, discipline, or termination of poor performers who may actually detract from public health and safety, despite any protected activity in which individuals may have engaged. However, in recent enforcement actions the NRC has applied an analytical framework, apparently based on EGM 99-007 and MIRT,² that only considers whether the record supports a "reasonable inference" of a retaliatory motive. In these cases, the NRC apparently equated a "reasonable inference" with a finding that adverse action was taken, at least in part, because of protected activity. This change in legal and evidentiary standards is clearly discussed in the comments provided by NEI.³

A consequence of the approach taken by NRC is that management could become reluctant to make decisions regarding their organization, to take adverse employment actions, or to set standards and ensure accountability, even where those decisions are warranted or would further enhance safe operations. There inevitably would be fear among managers and supervisors that protected activity may later be discerned by the NRC to have played some part in these decisions. Such a regulatory approach has the clear potential to diminish, rather than protect, public health and safety.

By the nature of their jobs, most--if not all--nuclear employees are required to identify, report, and resolve plant safety and performance issues. All employees, therefore, could at some point be considered to be "protected." The universe of management decisions implicated by Section 50.7 is therefore vast. Moreover, under the NRC's current

² "Report of Review of Allegations in NRC Office of Investigations Case Nos. 1-96-002, 1-96-007, 1-97-007 and Associated Lessons Learned", March 12, 1999 (MIRT Report).

³ Letter from Ralph Beedle to Mr. R. William Borchardt dated January 22, 2001, Discrimination Task Group Evaluation of NRC Processes to Handle Discrimination Allegations and Violations of Employee Protection Regulations.

Mr. Richard W. Borchardt

Page 4

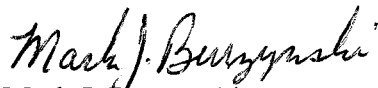
February 2, 2001

approach whereby an inference of some motivation relating to protected activity could be drawn based on knowledge of protected activity, such knowledge would become something for managers to avoid. Knowledge would become a basis for concluding that any subsequent decisions regarding the protected employee were motivated, at least in part, by the protected activity. This would discourage informing more senior managers of safety issues or other protected activity for fear of spreading the "knowledge." This result would run counter to sound policy that would encourage all managers to become involved in these issues to resolve safety concerns and to ensure no retaliation.

Licenseses must have the ability to structure their nuclear organizations and to evaluate employees. By applying an unduly low evidentiary threshold, the NRC contributes to a culture whereby a protected employee is essentially immune from adverse decisions. As noted above, it does not serve the NRC's regulatory purpose to create a regulatory regime by which an individual, once he or she has proclaimed "protected" status, must always get good performance reviews, must always get the same or biggest merit bonus, and must always get the job they apply for. Once again, management would be unduly restricted and nuclear safety potentially degraded.

TVA hopes that the above comments are useful to NRC in its evaluation of Section 50.7 employee protection processes. TVA urges NRC to adopt NEI's well-reasoned recommendations. In doing so, NRC will make substantial progress toward the realization of two important goals: achieving fairness in individual cases and promoting safety by maintaining licensees' ability to effectively manage its employees.

Sincerely,



Mark J. Burzynski
Manager
Nuclear Licensing

cc: U.S. Nuclear Regulatory Commission
ATTN: Document Control Desk
Washington, D.C. 20001-0001