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March 1, 2001

DOCKETED
USNRC

The Honorable Annette L. Vietti-Cook
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

March 4, 2002 (11:09AM)
OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Attn: Rulemakings and Adjudications Staff

Re: ***In the Matter of Tennessee Valley Authority***
(Docket Nos. 50-390-CivP; 50-327-CivP; 50-328-CivP;
50-259-CivP; 50-260-CivP; 50-296-CivP); ASLBP No. 01-791-01-CivP

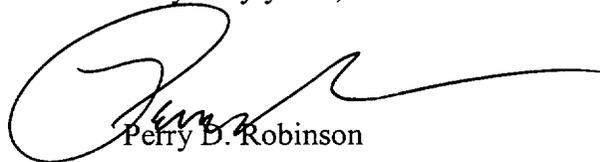
Dear Ms. Vietti-Cook:

Enclosed for filing in the above-referenced matter pending before the Atomic Safety and Licensing Board are originals and two conforming copies of each of the following, together with the accompanying Certificate of Service.

1. Motion of the Nuclear Energy Institute for Leave to File a Brief *Amicus Curiae*
2. Brief *Amicus Curiae* of the Nuclear Energy Institute

Thank you for your attention to this matter.

Very truly yours,



Perry D. Robinson

Enclosures
cc: All parties

UNITED STATES OF AMERICA
U.S. NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. Richard F. Cole
Ann Marshall Young

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

**MOTION OF THE NUCLEAR ENERGY
INSTITUTE FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE***

The Nuclear Energy Institute (NEI)¹ hereby moves the Atomic Safety and Licensing Board (ASLB or Board) for leave to file the attached brief as *amicus curiae* in this proceeding. NEI believes that the attached brief on the legal standard applicable to NRC discrimination cases under 10 C.F.R. § 50.7 would complement the briefs by the parties in response to the Board's request for briefs on legal issues presented by this case,

¹ NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all entities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, nuclear materials licensees, and other organizations and individuals involved in the nuclear energy industry.

and thereby assist the Board in determining the appropriate legal standard for a Section 50.7 violation. The Board has requested that the parties submit briefs on the following legal issues: (1) the definition of “protected activities” in NRC discrimination cases; (2) the standard of proof in “dual motive” discrimination cases; (3) the relevance of U.S. Department of Labor “remedy” case law; and (4) the role of “temporal proximity” in discrimination cases.²

NEI’s brief is focused on the legal standard applicable for finding a violation of Section 50.7, including a discussion of the genesis of the standard of proof applicable under Section 211 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851. The brief neither addresses new factual issues specific to this case, nor introduces new legal issues beyond those identified by the Board in this proceeding.³

As the organization responsible for establishing unified policy on matters affecting the nuclear energy industry, NEI represents the industry’s collective interest in the Board’s determination of the appropriate legal standard for Section 50.7 cases. The industry has had longstanding concerns regarding the bases upon which the NRC takes enforcement action for alleged discrimination in violation of Section 50.7, and thus the

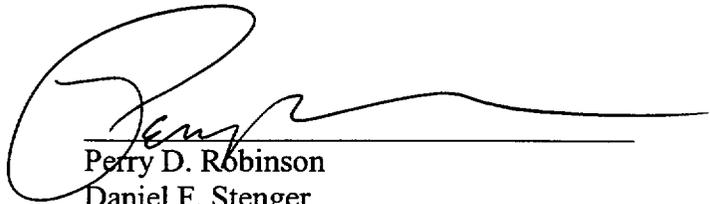
² Third Prehearing Conference Order (Telephone Conference, January 9, 2002), January 30, 2002. The Board has ordered that any briefs by the parties be filed by March 1, 2002. Fourth Prehearing Conference Order (Telephone Conference, February 5, 2002), February 13, 2002.

³ Under NRC practice, non-parties may file *amicus* briefs on appropriate issues in proceedings before the ASLB. See *Public Service Company of New Hampshire, et al.* (Seabrook Station, Units 1 and 2), ALAB-862, 25 NRC 144, 150 (1987). Further, we have contacted counsel for Tennessee Valley Authority and the NRC Staff, and they have both indicated that they do not object to NEI’s filing of this brief *amicus curiae*.

Board's ruling on the legal standard is of paramount importance to the entire industry. Further, this Board's determination may serve as precedent on the standard of proof required in future NRC discrimination cases.

For the foregoing reasons, NEI respectfully moves the Board to accept its brief *amicus curiae* and requests that it consider the important Section 50.7 issues affecting the industry as discussed therein.

Respectfully submitted,



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March 1, 2002

UNITED STATES OF AMERICA
U. S. NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion of the Nuclear Energy Institute for Leave To File Brief *Amicus Curiae* and the Brief *Amicus Curiae* in the above-captioned proceeding have been served on the following persons by overnight delivery; to the Secretary of the Commission by hand delivery; and by electronic mail as indicated by asterisks (*) below.

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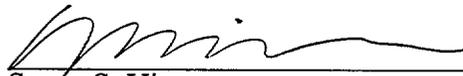
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This 1st Day of March 2002

UNITED STATES OF AMERICA
U.S. NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

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Sequoyah Nuclear Plant, Units 1 and 2;)	
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BRIEF *AMICUS CURIAE* OF THE NUCLEAR ENERGY INSTITUTE

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March 1, 2002

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

BRIEF AMICUS CURIAE OF THE NUCLEAR ENERGY INSTITUTE

I. Introduction and Statement of Interest of *Amicus Curiae*

The Nuclear Energy Institute (NEI) submits this brief as *amicus curiae* in support of Tennessee Valley Authority's (TVA) challenge of the Nuclear Regulatory Commission's (NRC) issuance of a Notice of Violation, EA-99-234 (NOV or EA-99-234) on February 7, 2000, and an Order imposing a civil penalty of \$110,000 on May 4, 2001, for an alleged violation of 10 C.F.R. § 50.7.

NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers,

major architect/engineering firms, fuel fabrication facilities, nuclear materials licensees, and other organizations and individuals involved in the nuclear energy industry.

NEI submits this brief in response to the Atomic Safety and Licensing Board's request for briefs from the parties on certain legal issues concerning the determination of discrimination under 10 C.F.R. § 50.7.¹ NEI believes this brief will assist the Board in determining the appropriate legal standard for a finding of discrimination under Section 50.7.

NEI also submits this brief out of concern that the NRC Staff's current enforcement approach in discrimination cases departs from the legal standard mandated by Congress under Section 211 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (Section 211). Departing from the standard of Section 211 has resulted in the issuance of Section 50.7 enforcement actions against TVA and other licensees, as well as individual managers, which as a matter of law fail to establish that discrimination took place. The Board's decision on the proper legal standard here will serve as a precedent for future cases regardless of the outcome of this case on its particular facts.

NEI also has concerns about the policy implications of the Staff's enforcement approach to discrimination matters. The prospect of being severely sanctioned by the NRC, a federal regulatory agency, based on limited evidence is of enormous concern to

¹ TVA and the NRC Staff have indicated to us that they do not object to the filing of this brief *amicus curiae*. This brief focuses solely on the appropriate legal standard and does not introduce any new issues in this proceeding. This brief also does not address any factual issues in this case. To the extent references are made to the NOV or various filings in this proceeding, they are included to provide relevant background or context for the arguments concerning the legal standard.

individual industry managers as well as licensees. While NEI's members fully support appropriate implementation of 10 C.F.R. § 50.7 to address any individual instances of discrimination, the NRC's current method of evaluating discrimination allegations has the potential to yield the very result 10 C.F.R. § 50.7(d) was adopted to avoid (*i.e.*, it could shield workers from legitimate management action in response to malfeasance or misfeasance in the performance of their duties. Further, NEI is concerned that the Staff's application of a substantive standard different than that set out in Section 211 appears to be an effort to use NRC enforcement authority to ensure licensees maintain a safety conscious work environment (SCWE).² Such action not only directly contradicts the Commission's express decision in 1997 to reject promulgation of a safety conscious work environment (SCWE) rule, but also constitutes rulemaking through enforcement contrary to the Administrative Procedure Act.

II. Issues and Summary of Argument

By orders dated January 30 and February 13, 2002, the Board requested the parties to address certain legal issues in pre-trial briefs. One of the issues is the appropriate legal standard to be applied in determining whether a violation of 10 C.F.R. §

² See *Draft Review and Preliminary Recommendations for Improving the NRC's Process for Handling Discrimination Complaints – Discrimination Task Group Report* (April 2001), at 3 (“An effective and consistent NRC approach for dealing with discrimination complaints is an important feature of encouraging and ensuring a [SCWE] . . .”). NEI recognizes that the Discrimination Task Group's recommendations are preliminary and have not yet been adopted by the Commission. However, they should not be discounted. They provide particularly pertinent insight into the Staff's current approach to enforcement action for alleged violations of Section 50.7.

50.7 has occurred. This brief discusses the development of that standard and the reasons the NRC should apply it.

NEI contends that the substantive legal standard for finding a discrimination violation under Section 50.7 is derived from Section 211. Consistent with the statutory scheme established by Congress, this standard is to be applied in a uniform manner by the NRC and the Department of Labor (DOL). Section 211 provides for the burden of proof to shift between the employee-complainant and the employer.

Once the employee has made out a *prima facie* case and the employer has articulated legitimate non-discriminatory reasons for its employment decision, the ultimate burden rests with the employee (here the NRC Staff) to prove by a preponderance of the evidence that the employer's proffered reasons were pretextual and that discrimination was a contributing factor in that decision. There is seemingly no disagreement with the NRC on what the standard is in this regard. However, at this stage of the analysis, it appears that the NRC departs from the statutory standard in several significant ways: it exaggerates the importance of tenuous factors such as temporal proximity to support a finding of discrimination, and thus the sufficiency of its evidence does not meet the preponderance of the evidence standard; it improperly shifts the burden of proof to the employer by demanding that the employer show that the adverse employment action was based "solely" on non-discriminatory business reasons; and contrary to 10 C.F.R. § 50.7(d), it accepts mere knowledge of protected activity to support its burden of proof rather than the higher showing of causation or intent required by this implementing regulation.

The result of NRC's enforcement approach is the issuance of discrimination violations without meeting the proper evidentiary standard. While the NRC has maintained in this case, and in others, that it properly follows the preponderance of the evidence standard, this case is really about saying one thing and doing another.

III. Argument

A. **The Legal Standard For Finding Discrimination In An NRC Enforcement Case Is Derived From Section 211**

In this case, the NRC Staff has expressed the view that 10 C.F.R. § 50.7 is independent of Section 211 and that Section 211 is merely "informative" in much the same way as Title VII of the Civil Rights Act. In fact, the NRC takes the position that it is "not bound by the Department of Labor's (DOL's) interpretation of section 211 in construing section 50.7. Rather, DOL decisions construing section 211 can be instructive when analyzing a violation of 10 C.F.R. § 50.7."³ Important in this regard is the fact that this interpretation is a change from the NRC's long-held position. In the past, NRC clearly stated that the same burdens of proof that would apply in DOL proceedings under Section 211 also apply to NRC enforcement for alleged discrimination.⁴ Further evidence that the NRC has historically applied the DOL analytical framework is found in the "Elements of Proof" section in Office of Investigations Procedures Manual.⁵

³ NRC Staff's Response to Tennessee Valley Authority's Motion for Summary Decision (February 20, 2002), at 29. *See also* Transcript of Pre-Hearing Conference, July 19, 2001, at Tr. 14.

⁴ "Reassessment of NRC's Program for Protecting Allegers Against Retaliation" (January 7, 1994), Appendix B at B-5.

⁵ Procedures Manual (1996), Section 3.2.2.10.2.

Included among the six elements listed are two related to the motivation of the employer, which the manual indicates are “necessary to substantiate a discrimination case”:

Whether or not the employer would have taken the same action even absent the employee’s engaging in protected activity (dual motive) and, in spite of this,

Whether there is other evidence that proves the employer’s arguments were pretextual and the employer’s motives were indeed discriminatory, regardless of its arguments to the contrary.

The purpose and history of Section 211, as well as the promulgation of the NRC’s own implementing regulation in 10 C.F.R. § 50.7, cannot support the Staff’s view. Contrary to the Staff’s belief, it is not “writing on a clean slate.” It does not possess unfettered authority to impose its own standard of discrimination different from that established by Congress in Section 211. The standard applied in an NRC enforcement case should be firmly rooted in this statutory standard and applied in a manner consistent with DOL.

Congress enacted Section 210 (the predecessor of Section 211) on November 6, 1978, as part of the NRC authorization and appropriations bill for fiscal year 1979. Public Law 95-601, 92 Stat. 2947. This legislation marked the first explicit proscription of workplace discrimination against nuclear whistleblowers. Section 210(a) prohibited discrimination by an employer against an employee for engaging in certain types of activities considered “protected activity.” Section 210(b) provided for DOL investigations of employee complaints and, for the first time, created a remedy for employees subjected to discrimination for engaging in protected activities. Other

provisions of Section 210 established a process for bringing and maintaining a discrimination complaint.

At the time Section 210 was being considered for enactment, the scope of the NRC's authority to protect whistleblowers was unclear. While general investigation and enforcement authority concerning public health and safety matters was vested in the NRC under Sections 186 and 234 of the Atomic Energy Act of 1954, 42 U.S.C. § 2013 *et seq.* (AEA), the AEA contained no provision on employee protection. Before the enactment of Section 210, the NRC had acted only to prohibit discrimination by licensees of *operating reactors* against employees who reported unsafe radiological working conditions pursuant to 10 C.F.R. § 19.16(c).⁶ Section 19.16 did not provide the NRC with authority to initiate inspection and enforcement action against construction permit holders or contractors and subcontractors of NRC licensees. *See* SECY-79-661, *Employee Protection for Individuals that Provide Information to NRC* (December 13, 1979), at 3-4.

Prior to enactment of Section 210, the NRC was internally wrestling with the question of its authority under the AEA. The Office of Executive Legal Director (OELD) opined that the AEA gave NRC "sufficiently broad" authority to promulgate a regulation prohibiting discrimination for an "employee's actions in reporting to NRC any

⁶ Section 19.16 allowed a worker who believed a violation of NRC requirements existed "with regard to radiological working conditions in which the worker is engaged" to request an NRC inspection. Under Section 19.16(c), a licensee was prohibited from discriminating against the worker. Section 19.16 was patterned after similar protections under the Occupational Safety and Health Act of 1970. *See* 38 Fed. Reg. 22,217 (1973) (Statement of Considerations for Part 19).

occupational or nonoccupational safety-related information regarding the construction or operation of a nuclear facility.” SECY-78-308, *Individuals Who Provide Information to the NRC; Remedies in the Event of Discrimination and Penalties for a Person that Discriminates* (June 9, 1978), Enclosure 5 at 2. At the same time, however, the NRC Staff as well as OELD pointed out that NRC’s existing authority under the AEA was “narrow.” SECY-78-308 at 12. Accordingly, the NRC recognized that in order to enhance its ability to secure information from whistleblowers it should request the “necessary *comprehensive* legislative authority” from Congress. SECY-78-308 at 7 (emphasis supplied).

These NRC statements shortly before the enactment of Section 210 indicate that, at best, the NRC was uncertain about its authority under the AEA. Section 210, then, was viewed by the NRC as the source of expanded powers in this area. Indeed, on July 14, 1982, the NRC published a final rule amending its regulations consistent with the new legislation by adding 10 C.F.R. § 50.7. 47 Fed. Reg. 30,452 (1982). In the Statement of Considerations for the final rule, the NRC described the purpose of the new Section 50.7 as follows (47 Fed. Reg. 30,452):

(1) to implement section 210 . . . (2) to incorporate into the regulations the Commission’s authority under Section 161 of the [AEA] to investigate an alleged unlawful discrimination against an employee and to take appropriate action, and (3) to complement the [DOL’s] program that is related to this matter (29 C.F.R. Part 24).

Thus, the NRC expressly stated that Section 50.7 was intended “to implement section 210” and “complement” DOL’s authority. In fact, the NRC observed that the rule “would announce the statutory prohibition of discrimination of the type described in

Section 210.” 47 Fed. Reg. at 30,452. Consequently, the language of the new Section 50.7(a) closely tracked the substantive standard in Section 210(a).

The NRC’s acknowledgement that Section 210(a) established the substantive standard and that its role was complementary to DOL’s, together with the close tracking of the Section 210(a) language by Section 50.7(a), demonstrates that the NRC itself recognized that Congress created a comprehensive scheme whereby both agencies would address discrimination through the use of a single substantive standard as set forth in Section 210(a).

During Congressional deliberations on Section 210, questions arose about the dual roles being created for the NRC and DOL. Senator Hart, the Manager of the legislation in the Senate, stated during the floor debates:

[The] new section 210 . . . is not intended to in any way abridge the [Nuclear Regulatory] Commission’s *current authority to investigate* an alleged act of discrimination *and take appropriate action* against a licensee-employer

124 Cong. Rec. S29771 (Sept. 18, 1978) (emphasis supplied). The NRC has cited this statement as the basis for its belief that Congress both recognized its independent authority under the AEA and explicitly intended that Section 210 would in no way abrogate that authority. *See* SECY-79-661 at 3; *see also* 45 Fed. Reg. 15,184 (1980). However, there is no reason to believe Senator Hart was suggesting that the NRC was free to ignore the substantive standard of Section 210(a). Rather, it seems most likely that Senator Hart was simply acknowledging that the NRC’s existing authority to investigate and take enforcement action against a licensee was not being supplanted by the new role given to DOL.

The integration of NRC's existing investigation and enforcement authority under the AEA with DOL's complementary role to provide a remedy for the individual formed a key component of the statutory scheme Congress intended by enacting Section 210. A Second Circuit opinion supports this view by indicating that DOL is vested with authority to provide remedies in response to individual discrimination complaints, whereas the NRC has "complementary" authority to investigate "*general* employment practices to determine whether those practices are having a chilling effect on would-be whistleblowers." *United States v. Construction Products Research, Inc.*, 73 F.3d 464, 472 (2d Cir. 1996). Thus, the NRC's existing authority and DOL's new role to provide individual remedies, when combined with the substantive standard of Section 210(a), form the integrated and comprehensive scheme intended by Congress. Under this scheme, the NRC was not given plenary authority to adopt a discrimination standard independent of Section 210.

In this regard, it is noteworthy that Section 210 was enacted as an amendment to Title II of the Energy Reorganization Act of 1974 (ERA). Title II established the NRC as an agency and transferred to it the regulatory and licensing functions of the former Atomic Energy Commission (AEC). The incorporation of Section 210 into Title II of the ERA was no accident:

[I]t appears that Congress was deliberate in assigning all provisions relating to the NRC to Title II and likewise, when amending Title II, by including the amendment (§ 210) in an appropriations bill limited to the NRC.

Adams v. Dole, 927 F.2d 771, 776 (4th Cir. 1991) (holding that Section 210 did not protect employees of contractors operating Department of Energy nuclear facilities). In

the absence of any indication to the contrary, it is reasonable to conclude that Congress's deliberate incorporation of Section 210 into Title II – the NRC's own enabling statute – was intended to ensure that the substantive standard of Section 210(a) would be applied by the NRC in the exercise of its existing enforcement authority. The Staff has not identified clear legislative language or legislative history to support a Congressional intent to allow inconsistency and non-uniformity.

B. The Legal Standard Under Section 211 And DOL Case Law

The Energy Policy Act of 1992 revised Section 210 in certain respects and re-designated it as Section 211. Public Law 102-486, Title XXIX, 106 Stat. 3124. Among other things, Section 211 lowered of the burden of proof for a complainant to establish a *prima facie* case of discrimination. Formerly, under Section 210, a complainant had to show that discrimination was a “significant,” “motivating,” or “predominant” factor. *See, e.g.*, 138 Cong. Rec. 11412, 11444-45 (October 5, 1992). As revised, Section 211 provided that the complainant need only show such behavior was a “contributing factor” in the unfavorable personnel action. 42 U.S.C. § 5851(b)(3)(A) and (C). In addition, Section 211 heightened the standard for denying a complainant relief where the employer could demonstrate by “clear and convincing” evidence that it would have taken the same unfavorable personnel action in the absence of protected activity. 42 U.S.C. § 5851(b)(3)(D).

These changes reflected a Congressional intent to refine Section 210, not substantively modify NRC or DOL responsibilities originally established under Section

210 or upset the balance of the employer-employee relationship. This conclusion is supported by New York Congressman Lent's floor statement about Section 211:

We have sought to *strike a balance* that ensures that employees are provided adequate relief in any cases where they would not have suffered adverse employment action but for their protected whistleblowing activity, while at the same time sending a clear message that any attempt to burden the system with frivolous complaints about employment actions that have their origins in legitimate considerations will meet with a swift dismissal and denial of any relief.

138 Cong. Rec. at H11412 (October 5, 1992) (emphasis supplied).

Based on the Section 211 revisions, Congress provided a workable scheme for shifting the burden of proof between the employee-complainant and the employer as follows:

1. The employee must present a *prima facie* case of discrimination by showing that: (1) he or she engaged in protected activity sanctioned under Section 211; (2) the employer was aware of his or her engagement in protected activity; (3) the employer took adverse employment action against him or her; and (4) the evidence sufficiently permits an inference that the adverse action likely was taken as a result of his or her engagement in protected activity. *Macktal v. U.S. Department of Labor*, 171 F.3d 323 (5th Cir. 1999); *see also Dartey v. Zack Co. of Chicago*, 82-ERA-2 (Sec'y April 25, 1983).⁷

⁷ The threshold level to establish a *prima facie* case is fairly low, and circumstantial evidence, such as temporal proximity between the protected activity and the adverse employment action, may be sufficient to satisfy the complainant's burden (continued...)

2. Upon the complainant's *prima facie* showing, the burden of production shifts to the employer to *articulate* a non-discriminatory business reason for the adverse employment action. *Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926 (11th Cir. 1995); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981).⁸

3. If the employer articulates a non-discriminatory reason for the employment action, the burden of production shifts back to the employee (and, in the NRC enforcement context, the Staff). The employee, or in the case of enforcement action the NRC Staff, also has the burden of persuasion to prove by a *preponderance of the evidence* that the employer discriminated against him. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Hoffman v. Bossert*, 94-CAA-4 (Sec'y September 19, 1995). At this point, the inference of discrimination arising from the *prima facie* showing disappears and the employee must show that the employer's "proffered reasons [are] incredible and constitute[] pretext for discrimination." *Overall v. Tennessee Valley Authority*, at 13. This constitutes a pretext case.

(...continued)

at this stage. *Adornetto v. Perry Nuclear Power Plant*, 97-ERA-16 (ARB March 31, 1999). See also *Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995) (citing *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (proximity in time is sufficient to raise an inference of causation)).

⁸ See *Overall v. Tennessee Valley Authority*, 1997-ERA-53 (ARB April 30, 2001), at 12 (the employer's burden to produce evidence that it had a legitimate, non-discriminatory reason "entails no credibility assessment").

4. In DOL cases, there is one more step in the analysis. Even if the employee is found to meet the preponderance of the evidence burden, DOL may not order “relief” if the employer demonstrates, by *clear and convincing* evidence, that it would have taken the same adverse personnel action in the absence of the employee’s engagement in protected activity. 42 U.S.C. § 5851(b)(3)(D). This evidentiary standard applies only in so-called “dual motive” cases — *i.e.*, where the employee has already met the burden of proof that discrimination was a contributing factor in the adverse action. *Adjiri v. Emory University*, 97-ERA-36 (ARB July 14, 1998).

C. NRC’s Departure From The Section 211 Legal Standard

The NRC Staff’s Response to TVA’s Motion for Summary Decision (*see pp. 29-30*) confirms that the Staff agrees with the first two steps of the burden shifting scheme established under Section 211 as described above. In particular, the NRC agrees that the preponderance of the evidence standard is the appropriate evidentiary standard for step three and, thus, for the instant case as well. *See* Transcript of July 19, 2001, Pre-Hearing Conference, at Tr. 8-9.⁹ However, as this enforcement action and others demonstrate, the

⁹ *See also* Report of Review, Millstone Units 1, 2, and 3: Allegations of Discrimination 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) at 6. The Staff concluded that “the preponderance of the evidence standard . . . is the standard to be applied if an administrative hearing is held on an agency enforcement case charging discrimination” apparently based on a memorandum issued by NRC Office of General Counsel (OGC). This OGC memorandum has never been released to the public despite previously submitted Freedom of Information Act requests and discovery requests made by TVA in this case which
(continued...)

NRC Staff is saying one thing but doing another – *i.e.*, it simply makes a token effort to comply with a preponderance of the evidence standard while in fact departing from it in significant ways. This case serves as an example of the Staff's approach – it appears from the NOV in this case that the Staff has not applied a preponderance of the evidence standard because it relies on evidence that is significantly less compelling than is required under the preponderance of the evidence standard to support a finding of discrimination.

As the standard requires, the employee must prove that the employer's purported reason was a *pretext* for discrimination – in other words, not the true reason for the adverse employment decision. The employee's burden of proof in this regard merges with his or her ultimate burden of persuading the tribunal that he or she was the victim of discrimination. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. at 248. The complainant may succeed in carrying this burden directly by showing that a discriminatory reason "more likely" motivated the employer or indirectly by showing that the employer's proffered explanation is not credible. *See Id.; McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-805 (1973).

At the preponderance of the evidence stage, the real issue is the sufficiency of the evidence required for the employee (or the NRC Staff here) to carry the ultimate burden

(...continued)

clearly encompass this document. Release of this document is necessary to afford the Board and the parties the opportunity to evaluate the legal bases upon which the Staff relies in asserting its right to adhere to a different substantive standard. In the context of this case and its examination of the correct legal standard to be applied in evaluating an alleged Section 50.7 violation, this Board has the authority to and, in our view, should compel release of the OGC document.

of persuasion. Evidence relevant to such a showing might include direct evidence, if any, of discriminatory intent towards the employee, including any threatening written or oral statements; the employer's reaction to the employee's legitimate protected activity or other antagonism by the employer toward protected conduct in general, such as ridicule, openly hostile actions or threatening statements; sudden and unexplained changes in an employee's performance rating; or departures from past practice of the employer or other forms of disparate treatment of employees. *See Timmons v. Mattingly Testing Services*, 95-ERA-40 (ARB June 21, 1996), at 6; *see also McDonnell Douglas*, 411 U.S. at 804-805; *DeFord v. Secretary of Labor*, 700 F.2d 281, 287 (6th Cir. 1983). To carry its ultimate burden of persuasion, however, the Staff must present probative evidence. More than mere inference drawn from circumstantial evidence, such a temporal proximity, is required to sustain a finding of discrimination at this stage of the analysis. *Dysert v. Florida Power Corporation*, 93-ERA-21 (Sec'y August 7, 1995), at 4, *aff'd*, 105 F.3d 607 (11th Cir. 1997).

The requirement for probative evidence, not mere inference, leads to the first area where the NRC Staff departs from the Section 211 standard. The NOV states that the "temporal proximity between the appointment of [the employee's two supervisors] . . . and [the employee's] . . . non-selection [for a chemistry position] in July 1996, and the disparate treatment [of the employee] . . . led the NRC to conclude that the [non-discriminatory] reasons . . . articulated by TVA . . . were pretextual." NOV at 3. The NOV also states that the NRC "considered it likely that an individual was pre-selected"

and that “at least two of the three individuals on the selection review board, and the selecting official, had knowledge” of the employee’s prior protected activity. *Ibid.*

While inference properly drawn from evidence that established a *prima facie* case may be considered at the preponderance of the evidence stage, to be probative and thus maintain the inference, the same evidence at this stage must be more highly scrutinized and capable of standing on its own. *See Overall*, at 13 (stating that the inference disappears after the *prima facie* stage if the employer has presented a legitimate non-discriminatory reason for its action, “leaving the single issue of discrimination *vel non*”). Supreme Court precedent under Title VII supports this view. As the Court stated in *Texas Dept. of Community Affairs*, if the employer carries its burden of production by providing a legally sufficient non-discriminatory explanation, “the presumption raised by the *prima facie* case is rebutted, and the factual inquiry proceeds to a new level of specificity.” 450 U.S. at 255 (footnote omitted).

Moreover, the Supreme Court has explained that temporal proximity must be “very close,” citing two cases in which three-month and four-month periods were deemed insufficient to support an inference of discrimination. *Clark County School District v. Breeden*, 532 U.S. 268, 121 S. Ct. 1508, 1511 (2001). In its Response to TVA’s Motion for Summary Decision (p. 35), the Staff concludes that the temporal proximity is only six weeks from a point in time when the alleged discriminators had the “opportunity for retaliation.” However, this position seems to presuppose that the same individuals had no other opportunity or means for retaliation since the purported protected activity took place nearly three years earlier. Thus, without deeper analysis and greater specificity of

its evidentiary basis, the Staff seems to be accepting a *prima facie* level of inference rather than demanding that its temporal proximity argument properly stand up against the required preponderance of the evidence standard. The Staff's analysis of the inferences to be drawn from the "disparate treatment" and "pre-selection" evidence seems similarly lacking in probative weight.

NEI's concern about the Staff's over-reliance on tenuous evidence does not end here. The NRC's departure from the preponderance of the evidence standard may also be seen in its treatment of TVA's proffered non-discriminatory business reasons in the NOV. In short, the NOV essentially dismisses them out-of-hand, without analyzing their probative value. This is further demonstrated by the NRC's over-reliance on mere knowledge of protected activity by certain people involved in the selection process, an approach that conflicts with prior NRC positions. As recognized in the MIRT Report, a finding of retaliation requires evidence of intent or bad faith.¹⁰

¹⁰ The MIRT Report (at p. 8) states that

knowledge that an employee has engaged in protected activity by the company official taking the adverse action, standing alone, would not be enough to establish that the protected activity was a "contributing factor." Instead, there would need to be an adequate evidentiary basis, i.e., a preponderance of the evidence, for a reasonable inference that the company official had *some motivation or impetus relating to the protected activity* that, in some meaningful way, was in ingredient in the decision to take adverse action. (Emphasis added.)

Thus, by using tenuous factors such as temporal proximity and mere knowledge, the NRC improperly elevates their inference to substitute for the sufficiency of evidence required under the preponderance of the evidence standard established by Section 211.

The second area of departure from the statutory scheme by the NRC concerns its improper shifting of the burden of proof to the employer by demanding that TVA show that the adverse employment action was based “solely” on non-discriminatory reasons. *See* NOV at 2.¹¹ Section 211 puts the ultimate burden of proof (by preponderance of the evidence) on the employee to show that engagement in protected activity was a “contributing factor” in the adverse employment decision. 42 U.S.C. § 5851(b)(3)(C). The Staff appears to agree that it has the burden to demonstrate that the non-discriminatory business reasons proffered by TVA are false or pretextual. *See* Staff’s Response to TVA’s Motion for Summary Decision, at 30. The Staff’s use of the “solely” standard not only improperly shifts its burden to the employer at the wrong stage in the analysis, but raises the evidentiary bar beyond that required by the preponderance of the evidence standard. Both actions are tantamount to redefining the statutory scheme set forth in Section 211 without proper enabling authority and, thus, on their face violate the Administrative Procedure Act.

¹¹ Although the NRC does not elaborate on this point in the NOV, it does provide a window into the NRC’s analytical approach. A licensee should be able to presume that an agency’s stated rationale for a regulatory sanction (as explicitly provided in the NOV in this case) accurately reflects the agency’s position on the legal standard utilized in reaching the decision.

Where, as in Section 211, Congress has established a remedial scheme within an agency (DOL) for addressing employment discrimination, another federal agency has no authority to modify that scheme by providing new remedies or imposing new burdens on the regulated parties. As the Supreme Court has emphasized in addressing the most familiar of the federal employment discrimination laws, Title VII of the Civil Rights Act of 1964, the “comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent” that the scheme not be modified by the addition of new rights or remedies. *Northwest Airlines v. Transport Workers Union of America, AFL-CIO, et al.*, 451 U.S. 77, 93-94 (1981) (refusing to alter statutory scheme by reading into Title VII a right of defendant to seek contribution from a third party who participated in discrimination).

In addition, the “solely” evidentiary standard would be greater than that required at the final stage of the DOL discrimination analysis, where the employer, in a “dual motive” case, is required to demonstrate by clear and convincing evidence that it would have taken the same adverse personnel action even in the absence of the employee’s engagement in protected activity. Although perhaps not amenable to accurate quantification, this clear and convincing evidence provision would seem to require a lesser showing than the absolute “solely” standard being applied by the NRC.

The Board may not need to reach the exact metes and bounds of the DOL remedy case law under the clear and convincing evidence provision of Section 211.¹² In any

¹² TVA maintains that no retaliatory motive exists and, therefore, that this is not a “dual motive” case. Important in this regard is the Staff’s position that, in a “dual
(continued...)

event, the only relevant legislative history on this provision indicates that a clear and convincing showing by an employer would rebut any inference of a violation arising from the complainant's case. During the floor debates, Congressman Ford explained:

At the administrative law judge hearing and in the subsequent appeal, the complainant's burden of proof will be governed by new section [210](b)(3)(C) and (D). Once the complainant makes a prima facie showing that protected activity contributed to the unfavorable personnel action alleged in the complaint, a violation is established *unless* the employer establishes by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.

138 Cong. Rec. H11412, H11444-45 (emphasis added).¹³

(...continued)

motive" case, the employer/licensee should not have the opportunity to show, by clear and convincing evidence, a legitimate basis for the adverse action. The Staff has stated that this opportunity is unavailable to the employer/licensee because it only applies to the personal remedy accorded through the DOL proceeding and not to whether a violation of Section 50.7 existed. The Staff's position effectively eviscerates Section 50.7(d). Staff's position regarding the remedy-violation distinction should not stand.

¹³ In dual motive cases, the NRC in the past has sought to align the ultimate outcomes in Section 211 and Section 50.7 cases. For example, in the Section 211 case of *Yule v. Burns International Security Service*, 93-ERA-12, the NRC issued a Section 50.7 NOV against Northern States Power Company (EA-93-192, issued on January 26, 1994) based on the finding of discrimination by the DOL Administrative Law Judge. On appeal, the Secretary of Labor held that, while the employer may have been motivated in part by the guard's engagement in protected activity, the employer showed that it nevertheless would have terminated the guard. Achieving a consistent outcome in the case, the NRC accordingly *withdrew* its NOV on the grounds that in the DOL case, the employer "proved that it legitimately would have discharged [Yule] even if she had not raised any concerns about nuclear safety." See Letter of Hubert J. Miller, NRC Regional Administrator, Region III, to Northern States Power Company, dated September 11, 1995.

The Staff's departure from Section 211 is nowhere more obvious and nowhere more troubling than in its implementation of 10 C.F.R. § 50.7(d). In the context of enforcement, the Staff, not the licensee, bears the burden of proof to show by a preponderance of the evidence that the licensee retaliated against the employee *because* of his or her engagement in protected activity. Specifically, Section 50.7(d) provides that the "prohibition [against discrimination] applies when the adverse action occurs *because* the employee has engaged in protected activity." (Emphasis added.) Thus, Section 50.7(d) explicitly requires a showing of causation or intent — *i.e.*, that adverse action was taken "because" the employee engaged in protected activity. Reliance on tenuous "inferences" such as temporal proximity and mere knowledge cannot be reconciled with the "because of" standard explicitly stated in Section 50.7. Accepting evidence of mere inference of discriminatory intent or causation incorrectly imposes a *prima facie* evidence standard, thus truncating the analysis prematurely.

As a matter of law, the NRC cannot incorporate Section 211 into its own regulations and then apply that provision in a way that is inconsistent with Section 211. More specifically, the NRC Staff cannot apply the law (via its regulation at Section 50.7) in a manner that results in different ultimate outcomes — *i.e.*, in a way that subjects a licensee to federal civil sanctions (and potentially criminal sanctions for violations considered to be willful) where the licensee otherwise would not be liable to the

complainant under Section 211. *See Northwest Airlines, supra*, 451 U.S. at 93-94. Nor can an agency enforce a new interpretation of its regulations without adequate notice.¹⁴

For all the reasons discussed above, the NRC's departure from the burden of proof scheme set out in Section 211 and relevant case law cannot be reconciled with the intent of Congress, the explicit statutory language of Section 211 or Section 50.7 itself.

D. The NRC's Standard In Section 50.7 Cases Has Significant Policy And Practical Implications

Application of the correct legal standard has significant implications for the industry. First of all, if the NRC continues to use a standard to judge discrimination independent of Section 211 and divorced from DOL precedent, it is likely that there will be inconsistent results by two federal agencies on the same set of facts. As explained above, a principal aim of Congress in enacting in Section 211 was to achieve uniformity through a single substantive standard for determining if unlawful discrimination occurred. It would be an absurd result to read into Congress's actions an intent to implement a statutory and regulatory regime whereby two federal agencies could reach inconsistent legal conclusions when examining the very same facts. Congress must have intended that the same elements would be applied by both DOL and the NRC in the exercise of their respective and complementary powers. For the NRC to impose its own

¹⁴ *See generally General Electric Co. v. U.S. Environmental Protection Agency*, 53 F.3d 1324 (D.C. Cir. 1995). Where an interpretation of a regulation is made for the first time, fair notice must be given *before* subjecting a party to enforcement. Under such circumstances, fair notice means that "by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform." 53 F.3d at 1329 (*citing Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976)).

independent substantive standard would erode the uniformity sought by Congress and upset the balance that Congress sought to achieve through Section 211.¹⁵

Moreover, such a dual approach creates considerable uncertainty for licensee management. As the industry's safety and production records show, licensees have made great strides in instilling higher standards of performance at their stations. This requires fair and objective performance rating standards for personnel in all organizations, as well as a willingness to make difficult personnel decisions necessary to address deficient human performance or to facilitate changes designed to maintain excellent performance, even if they at times involve decisions that affect employees' careers. An environment that is not conducive to management's ability to perform its job would be detrimental to the desired goal of sustaining high performance standards at licensee facilities. Many licensees also have implemented reorganizations and realignments in order to achieve improvements in the efficiency and effectiveness of their nuclear operations groups. Licensees cannot be sure when such corporate reorganizations or management initiatives will come under question because of the NRC Staff's departure from the substantive

¹⁵ The danger of inconsistent results is illustrated by the enforcement action issued to Rob Grant, an employee of Numanco, L.L.C., a contractor for Commonwealth Edison Company (IA-00-038, issued on September 6, 2000). There, the NRC found that Mr. Grant, a Radiation Protection (RP) manager, had discriminated against an RP technician when the contractor *temporarily* suspended the technician *with pay* pending an investigation of a workplace incident. DOL precedent indicates that even suspension *without pay* may not constitute adverse action for the purposes of Section 211. *Griffith v. Wackenhut Corp.*, 1997-ERA-52 (ARB February 29, 2000). The NRC had not previously stated a position on the issue. In taking the enforcement action, the NRC announced for the first time that it would treat temporary suspension with pay as an adverse action under Section 50.7.

standard in discrimination enforcement actions. Ultimately, such an approach can be counterproductive from a safety standpoint if it hinders legitimate management initiatives designed to improve operational performance. Such a development also may encourage abuse of Section 211 and Section 50.7 protections by disgruntled or less qualified employees, resulting in the erosion of confidence in the process by those with truly legitimate concerns. This result would run afoul of the intent of Congress to discourage frivolous claims.

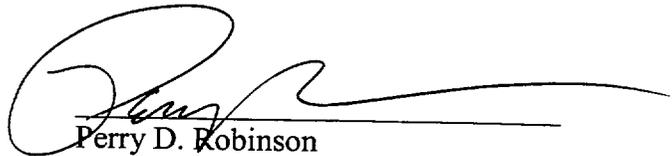
In addition, it is important that the Staff not be permitted to take enforcement action for a violation of Section 50.7 merely on an inference drawn from the fact that the decision-maker had knowledge of the protected activity at issue. Such action by Staff would serve as a disincentive to managers who should be made aware of issues regarding protected activity. A continuation of the Staff's current approach could yield results contrary to those the NRC sought to achieve in its Policy Statement encouraging licensees to maintain safety conscious work environments because the senior managers who should be addressing problems, if they arise, will not be able to do so if they are not made aware of them.

Finally, the NRC Staff should not use enforcement of Section 50.7 as a surrogate for a SCWE rule, which the Commission considered and rejected in 1997. To the extent the NRC Staff uses its authority under Section 50.7 to enforce the SCWE policy (1996 SCWE Policy Statement, 61 Fed. Reg. 24,336 (1996)), the NRC would be engaging in rulemaking through enforcement, contrary to the Administrative Procedure Act and the Commission's own policy decision with respect to the need for a SCWE rule.

IV. Conclusion

For purposes of this proceeding, the Board should apply the legal standard derived from Section 211 and applied in relevant case law in the DOL context – the preponderance of the evidence standard. Under this standard, the employer must have a fair opportunity to present its legitimate business reasons for any employment decision made. The NRC must carry the ultimate burden of proving, by a preponderance of reliable and probative evidence, that those legitimate business reasons were pretextual and that discrimination was a contributing factor in the employment decision.

Respectfully submitted,



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March 1, 2002