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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

TENNESSEE VALLEY AUTHORITY'S PETITION FOR REVIEW OF INITIAL DECISION IN LBP-03-10

July 16, 2003

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TENNESSEE VALLEY AUTHORITY'S PETITION FOR REVIEW OF INITIAL DECISION IN LBP-03-10

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.786(b) (2003), the Tennessee Valley Authority (TVA) hereby petitions the Commission for review of the June 26, 2003, Initial Decision issued by the Atomic Safety and Licensing Board (Board) in LBP-03-10 concerning whether TVA violated 10 C.F.R. § 50.7 in 1996 when it did not select Gary Fiser, a former TVA employee, for a competitive position purportedly for having engaged in protected activities. This is the first proceeding which presents the Commission with an opportunity to clarify the scope of § 50.7 and the relevant legal standards. TVA submits that the Board's Initial Decision (a) makes findings of material fact that are clearly erroneous; (b) makes necessary legal conclusions which are without governing precedent and which are contrary to established law; and (c) raises substantial and important questions of law, policy, and discretion. Accordingly, for the reasons more fully set forth below, TVA requests that the Commission undertake review of and overturn the Board's Initial Decision in LBP-03-10.

II. SUMMARY OF PROCEEDING AND DECISION BELOW

This proceeding was initiated by TVA's request for a hearing on a May 4, 2001, order from the Nuclear Regulatory Commission (Staff) imposing a civil monetary penalty of $110,000. The order was, in turn, based on a February 7, 2000, Notice of Violation (NOV) against TVA for allegedly violating § 50.7 by discriminating against Mr. Fiser.

The Board found that Mr. Fiser's 1996 nonselection came in the context of a massive reorganization in which the TVA Nuclear (TVAN) organization eliminated/modified the duties of thousands of employees because it was changing from a construction mode to an operating mode for all of its nuclear units (dec. at 4). The Board further found that as a result of the reorganization, more than 30 jobs in Nuclear Operations Support, including Mr. Fiser's, were eliminated, while only 20 jobs were created (dec. at 48). The Board agreed with TVA that the reorganization was motivated by legitimate business reasons and was not intended to discriminate against any individual, including Mr. Fiser (dec. at 48). The Board also found that TVA had "seemingly significant performance-oriented reasons" that played a large part in Mr. Fiser's nonselection for one of the newly created jobs (dec. at 4). However, despite the legitimate reasons TVA had for the 1996 reorganization and Mr. Fiser's nonselection, two members of the Board stated that discrimination was a "dual motive" in the actions taken with respect to Mr. Fiser and therefore found that TVA discriminated against him in violation of § 50.7 (dec. at 13, 63). In reaching that conclusion, the majority addressed the legal and evidentiary standards and announced that § 50.7 prohibited "any degree of discrimination for protected activities . . . even though not the primary or even a substantial basis for the action" (dec. at 18). The majority reduced the civil penalty from $110,000 to $44,000 because of the "minor" role that protected activity played in Mr. Fiser's nonselection (dec. at 68) and because the Staff and the majority had adopted new interpretations of § 50.7 expanding the scope of "protected activity" and changing the proof requirement of causation (dec. at 5, 64, 67).

In a strongly-worded dissent, Judge Young observed that she failed "to see any participation in any protected activity in any substantive sense that was actually related to a safety matter in any way reasonably encompassed by § 50.7" (dec. at 74) and pointed out that the majority's interpretation of "protected activity" was contrary to common sense and the express wording of § 50.7. Even more significantly, Judge Young found that the Staff had "not shown ***by a preponderance of the evidence in this proceeding . . .*** that any disparate treatment of, or adverse action against, Mr. Fiser that did occur was taken ***because of*** any protected activity" (dec. at 71, 72; emphasis in original). Judge Young further pointed out that the majority decision would "create a potential for abuse of the § 211 [of the Energy Reorganization Act] and § 50.7 protections," for "possible erosion of confidence in the process by those with truly legitimate concerns," and for "counterproductive results as well . . . on the part of management attempting to improve operational and safety performance and best utilize the skills of personnel" (dec. at 81).

III. DISCUSSION

The Commission should grant review of the Board's initial Decision under 10 C.F.R. § 2.786(b)(4)(i)–(iii), because:

(a) The majority decision makes clearly erroneous factual findings with respect to the existence of a discriminatory motive and with respect to the finding of a violation of § 50.7;

(b) The majority decision makes incorrect legal interpretations of § 50.7 (1) in adopting a four-part test for discrimination and applying a "dual motive" standard with no analysis or explanation (dec. at 17); (2) in holding that § 50.7 is violated by finding "any" discrimination without determining that the discriminatory motive was "significant" or had an influence or contributed to the adverse action; and (3) in holding that participation in the resolution of safety matters is a protected activity (dec. at 33, 72); and

(c) As Judge Young pointed out, the majority decision raises substantial questions of law and policy.

Accord, Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-09, 53 NRC 232, 234 (2001).[1]

A. The majority decision makes numerous factual findings which are clearly erroneous. The majority's finding of discrimination is premised on the theory that Dr. Wilson C. McArthur and Thomas J. McGrath—the two alleged discriminating officials—had the requisite discriminatory intent (dec. at 65)[2] and is based on inferences drawn from circumstantial evidence as opposed to direct testimony of retaliatory intent (dec. at 61-62). However, the circumstances relied on by the majority (dec. at 62-63) do not reasonably and fairly give rise to either an inference that Dr. McArthur or Mr. McGrath had a discriminatory animus or that there was a violation of § 50.7. In fact, the record in this case clearly shows that each of the so-called "plethora of career-damaging situations and circumstances to which Mr. Fiser was subjected" were either not the responsibility of Mr. McGrath or Dr. McArthur or were not in any part motivated by discrimination. Further the majority unreasonably, and with no support in the record, concludes that there was a "pattern of discrimination that was likely orchestrated by [unnamed] persons in authority at TVA to terminate Mr. Fiser's career" (dec. at 63). The majority was clearly erroneous in concluding, based on mere inferences from otherwise innocent and unconnected circumstances, that there was a plot to "terminate Mr. Fiser's career." These are the kind of clearly erroneous factual findings for which Commission review is appropriate and necessary to assure

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1 Pursuant to the "clearly erroneous" standard in 10 C.F.R. § 2.786(b)(4)(i), the Commission generally declines to second-guess plausible Board decisions that rest on carefully rendered findings of fact, but will undertake review where the Board decision contains "obvious error." *See Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3), CLI-02-22, 57 NRC 213, 222 (2002); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 382 (2001). Further, pursuant to 10 C.F.R. § 2.786(b)(4)(ii), the Commission may accept review where a necessary question of law is without legal precedent. *See Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 28 (2001) (Commission accepted review where interpretation of a regulation involved a question of law that was raised before and had the potential to be raised again in other proceedings).

2 The Staff issued NOVs to both Dr. McArthur and Mr. McGrath (JX 48, 49). Despite the stigma to their reputation and the injury to their careers, they were not afforded an opportunity for a hearing to clear their names.

appropriate and careful analysis in an important enforcement case. It was clearly erroneous to find that any of the "career-damaging situations" were due to discrimination.

(1) The majority cites "the disparate treatment accorded to Dr. McArthur and Mr. Fiser" (dec. at 62). However, the record shows that the treatment of Mr. Fiser was not disparate at all when compared to everyone in TVAN whose position description was rewritten, ***Including Dr. McArthur.*** In fact, the treatment of both individuals was determined by the TVAN Human Resource organization in accordance with its published procedures, not by Dr. McArthur or Mr. McGrath. The inference drawn by the majority is entirely inappropriate.

(2) The majority cites the "propounding of technical questions by the SRB [Selection Review Board]" that purportedly favored another candidate (dec. at 63). However, it was undisputed that the SRB, not Dr. McArthur or Mr. McGrath, selected the questions based on the current critical needs of the plants (Tr. 2880 (Corey), 5174 (Rogers)). Even Mr. Fiser's ally—Jack Cox—testified that the questions that were asked were fair and reasonable based on the needs of the plants and the current concerns in TVAN and the nuclear industry (Tr. 1778-80 (Cox)). The majority would require TVA to tailor its interview questions for Mr. Fiser's benefit, regardless of the needs of the plant.

(3) The majority cites a "statement by Charles Kent . . . of Mr. Fiser's history of filing DOL complaints" (dec. at 63). That statement clearly does not evince any discriminatory animus by Dr. McArthur or Mr. McGrath. Furthermore, rather than showing any discriminatory animus, the evidence was undisputed, as pointed out by the dissent, that Kent's comment was a caution "to ***avoid*** taking any negative action against Mr. Fiser based on [his] protected activity" (dec. at 79; emphasis in original). See also the Staff's Dec. 20, 2002, Findings of Fact (FoF) at 65-66, ¶¶ 2.186-2.189.

(4) The majority questions the makeup of the SRB because Mr. Cox—an ally of Mr. Fiser—was not a member (dec. at 62). The majority ignores the undisputed evidence that Dr. McArthur selected Mr. Cox to sit on the original SRB but that Mr. Cox informed Dr. McArthur shortly before the interviews that he could not serve due to scheduling conflict involving a personal matter (Tr. 1770-71 (Cox)). The majority draws an erroneous inference of discriminatory intent in second-guessing Dr. McArthur's business judgment to replace Mr. Cox and proceed with the interviews based solely on the fact that the majority would have made different decisions. The majority also ignores the fact that the SRB was conducting interviews for five different positions and the majority's finding would have required TVA to tailor the composition of the SRB especially for Mr. Fiser.

(5) The majority infers discriminatory intent on the part of Mr. McGrath and Dr. McArthur from "the virtual preselection of Mr. Harvey by virtue of the personnel makeup of the SRB and the questions asked by the SRB" (dec. at 63). This is inconsistent with the majority's own finding that the Staff's evidence did not prove that Mr. Harvey had been preselected (*id.* at 58-60).

(6) The majority infers intent on the part of Mr. McGrath and Dr. McArthur from "the temporal proximity of Mr. Fiser's non-selection" to his filing of "the 1996 DOL complaint" (*id.* at 63). This is erroneous as a matter of law because the majority ignored undisputed evidence, as the dissent points out, that the decisions to reorganize TVAN, to rewrite all job descriptions, and to post the PWR Chemistry Manager position all had been made prior to Mr. Fiser's filing his 1996 DOL complaint (dec. at 76). Thus, it was impossible for those decisions to have been made "because of" his 1996 DOL complaint. *See Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001).

(7) The majority infers discriminatory intent on the part of Mr. McGrath and Dr. McArthur because of "the attempted RIF of Mr. Fiser in 199[3]" (dec. at 63). However, the evidence is undisputed that neither Mr. McGrath nor Dr. McArthur played any role in the issuance of the 1993 RIF notice to Mr. Fiser, and the majority does not point to any evidence in the record from which an inference to the contrary can be reasonably drawn. Equally important, Mr. Fiser did not identify Mr. McGrath or Dr. McArthur in his 1993 DOL complaint as the officials responsible for his removal (SX34).

(8) The majority infers discriminatory intent on the part of Mr. McGrath because he ordered "the rewriting of position descriptions in 1996" (dec. at 63.). This fact cannot reasonably give rise to an inference of discriminatory intent because the overwhelming majority of position descriptions for Operations Support were rewritten. Of equal importance, Mr. McGrath made this decision ***before*** he learned of the 1993 DOL complaint, the Sasser letter, or the 1996 DOL complaint (Tr. 415-16, 471-72 (McGrath); SX133 at 41, 47, 93). This lack of knowledge negates any inference of discriminatory intent. *See Clark County Sch. Dist.*, 532 U.S. at 273.

(9) The majority infers intent on the part of Dr. McArthur because of his "expressed warning . . . to Mr. Fiser (in 1993) to the effect that he should not file a DOL complaint because people 'don't want somebody that is a trouble maker'" (dec. at 63). The evidence does not support this inference and is contrary to the law. Besides the remoteness of this purported comment to Mr. Fiser's 1996 nonselection, this comment does not identify either Mr. McGrath or Dr. McArthur as one of the "people" to which the majority refers, it was in the context of Mr. Fiser seeking employment outside of TVA, and further does not provide any indicia that it relates in any way to the act at issue—Mr. Fiser's nonselection—that occurred three years later. *See Balderston v. Fairbanks Morse Engine Div. of Coltec Indus.*, 328 F.3d 309, 324 (7th Cir. 2003) ("A statement of discriminatory animus must be made by [the] decisionmaker ***and*** relate to the action at issue"; emphasis added.); *Sanghvi v. St. Catherine's Hosp. Inc.*, 258 F.3d 570, 574 (7th Cir. 2001).

In sum, the nine purportedly "career-damaging situations" cited by the majority neither individually nor collectively support a finding of a "pattern of discrimination" "orchestrated" by either

Mr. McGrath or Dr. McArthur and it was clearly erroneous for the majority to make such findings.[3]

B. The majority decision is based on an incorrect interpretation of § 50.7. Although § 50.7 clearly prohibits discrimination against an employee for engaging in protected activity, it does not immunize an employee who has engaged in protected activity from adverse action based on legitimate reasons. Section 50.7(d) clarifies that the protection applies only "when the adverse action occurs ***because*** the employee has engaged in protected activities" (emphasis added). The majority incorrectly interpreted and applied the legal and evidentiary standard dictated by the Commission's regulation.

First, the majority adopted a four-part test to determine if the Staff met its burden to prove discrimination (dec. at 17-18, 71). That test, which was drawn from the March 12, 1999, "Report of Review, Millstone Units 1, 2, and 3," is the "standard [NRC OE and OGC] currently use to determine when an enforcement case should be instituted" (MIRT report at 3). Thus, that test is inapposite to whether the Staff has met its ultimate burden of proof. Although the analytical paradigm for proof of discrimination is well established under both Section 211 and Title VII, there is no precedent for the test used by the majority. The majority states that its decision will be "guided by the legal analyses submitted by TVA and the Staff" (dec. at 10), both of which recite the analytical paradigm for cases under Section 211 and Title VII (TVA FoF ¶¶ 13.5-13.10 and Staff FoF ¶¶ 3.9-3.13), and in fact the majority relies heavily on precedents decided under Section 211 and Title VII (dec. at 9, 11, 17, 61, 62). However, the majority fails to explain why it does not adopt the established analytical framework. That failure is significant since the established Section 211 and Title VII paradigm requires the factfinder to evaluate whether the preponderance of the evidence shows that the employer-articulated reason for taking an adverse action is a pretext to conceal discrimination.[4] *See McDonnell Douglas Corp.* v. Green, 411 U.S. 792 (1973); *Manzer v. Diamond Shamrock Chem. Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994). The majority did not engage in any analysis of whether TVA's reason for taking adverse action was a pretext for discrimination. Not only did the Board not make a finding of pretext, it in fact found that TVA had legitimate reasons for its actions.

The majority ignored the *McDonnell Douglas* analysis, which both TVA and the Staff agreed should be used in this proceeding,[5] and erroneously assumed, once again without explanation or

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3 Although Fiser claimed to have identified and documented various technical issues, as both the majority and dissent found, he did not. The majority's failure to conclude that his testimony was not credible was also clearly erroneous.

4 Even using the four-part MIRT report test for determining whether to initiate enforcement action, a determination must be made whether (1) the employer-articulated reason is a pretext to conceal discrimination or (2) the articulated reason is part of a dual motive for the action. (MIRT report at 4.) The majority did not perform such an analysis.

5 *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000) ("Because the parties do not dispute the issue [that McDonnell Douglas applies], we shall assume, *arguendo*, the *McDonnell Douglas* framework is fully applicable here.").

analysis, that this was a "dual-motive" case (dec. at 13). The necessary evidentiary threshold to trigger the application of a dual-motive analysis is direct or circumstantial "'evidence of conduct or statements that both reflect directly the alleged discriminatory attitude [of Mr. McGrath or Dr. McArthur] and that bear directly on the contested employment decision.'" *Thomas v. NFL Players Ass'n*, 131 F.3d 198, 204 (D.C. Cir. 1998); *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 550 (10th Cir. 1999). The Staff did not present, nor did the majority point to, any such evidence.

Compounding its legal error, the majority then incorrectly held that in a "dual-motive" case, § 50.7 is violated by finding "any" discriminatory motive without making a quantitative determination as to whether that motive affected or caused the decision (dec. at 14-15, 18, 67). That interpretation is inconsistent with the plain language of § 50.7 which states that the "prohibition applies when the adverse action occurs ***because*** the employee has engaged in protected activities" (§ 50.7(d); emphasis added). The use of the term "because" is an explicit requirement that discrimination be proven to play a "significant" part in bringing about the adverse action. In *Price-Waterhouse v. Hopkins*, 490 U.S. 228, 262-69 (1989), the Supreme Court held that the "because of" causal nexus under Title VII requires a showing that discriminatory animus was a contributing factor in the personnel action at issue. The MIRT report is in full agreement that discrimination must be proven to be a "contributing factor" *i.e.*, "play a significant part" in the result (an approach that is inherently recognized in the dissent's analysis). It goes on to state that:

> [K]nowledge 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 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 an ingredient in the decision to take the adverse action" [MIRT report at 8].

In this proceeding, after stretching the evidence to find a protected activity, the majority merely assumed an inference of discriminatory animus without considering whether there was evidence showing that the protected activity was a cause of Mr. Fiser's nonselection in 1996. In ignoring the causation requirement, the majority fails to provide a meaningful, workable legal and evidentiary standard. Contrary to the majority's perception, TVA is not arguing that "minor" discrimination is not a violation. Rather, it has always been TVA's position that there must be a showing, by a preponderance of the reliable evidence, that the protected activity was in fact a contributing factor in the specific adverse action at issue.[6]

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6 It was undisputed that of the three SRB members, Heyward Rogers had no knowledge of Mr. Fiser's purported protected activities. Although the other two members of the SRB had some knowledge of Mr. Fiser's protected activities, a statistical analysis strongly indicated that knowledge of his protected activity had no effect on his low ratings by the SRB. Indeed, Mr. Rogers rated Mr. Fiser lower than did the two SRB members who had some knowledge of his protected activities (TVA FoF ¶¶ 9.40-9.43). Although this was the only objective evidence tending to prove or disprove a causal relation

Finally, in a decision without precedent, the majority interprets "protected activities" in § 50.7 to include participation in the resolution of an already-identified safety issue (dec. at 33). This is contrary, of course, to the regulatory language which includes in general providing information to the NRC or the employer about violations of the Atomic Energy Act or the ERA or requirements imposed pursuant to those statutes. As pointed out by the dissent, it is not reasonable to include participation in the resolution of already-identified issues as a protected activity since that is not the type of activity likely to be undertaken against the wishes of the employer (dec. at 72). The dissent's position is supported by the Commission's own comments regarding its 1982 amendment to § 50.7. *See* 47 Fed. Reg. 30452, 30453 (July 14, 1982) ("Employees are an important source of such information and should be encouraged to come forth with any items of potential significance to safety without fear of ***retribution*** from their employers"; emphasis added.). The majority's position is contrary to employment law precedent, requiring that the activity sought to be characterized as protected activity must itself "implicate safety definitively and specifically." *American Nuclear Resources v. DOL*, 134 F.3d 1292, 1295 (6th Cir. 1998). Being assigned to work on already-identified safety concerns certainly is not "com[ing] forward with any items of potential significance to safety" and further does not "implicate safety" in any fashion, much less "definitively and specifically." The dissent and controlling case law highlight the fallacy of this aspect of the majority decision.[7]

The issues addressed by the majority on these matters have never been addressed by the Commission or any other licensing board, and the majority's decision is without precedent. These matters are obviously crucial to the evaluation and resolution of future investigations of alleged violations of § 50.7. In voting on Staff paper SECY-02-0166,[8] the Commission declined to address the issue of the appropriate legal standards to apply in discrimination cases. Now, in an adjudicatory context, with

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(. . . continued) between Fiser's nonselection and his protected activity, the Board completely failed to discuss this statistical analysis.

7 It was also prejudicial procedural error for the Board to include participation in resolution of safety issues and to rely upon a letter to former Senator Sasser as protected activity (10 C.F.R. § 2.786(b)(4)(iv) (2003)). The NOV issued to TVA indicated that Mr. Fiser's protected activities were his "identification of chemistry related nuclear safety concerns" and his 1993 ERA complaint. The NOV does not claim that Mr. Fiser's protected activities included sending a letter to former Senator Sasser or his participation in resolution of already-identified issues. (Contrary to the statement in the NOV, the majority and dissent correctly acknowledged that Mr. Fiser did not identify, raise, or document any of the various technical issues discussed in this proceeding (dec. at 37, 38, 39, 42-43, 46, 73-74).) Although the hearing before the Board was de novo, the NOV defines the charge in this proceeding (*i.e.*, the Staff has the burden to prove its allegations by a preponderance of the evidence) and the Board was required to determine whether those charges should be sustained. *Radiation Tech., Inc.*, ALAB-567, 10 NRC 533, 536-37 (1979). Clearly, it was prejudicial error to sustain the NOV based on a different legal theory and different facts than were cited in the NOV.

8 "Policy Options and Recommendations for Revising the NRC's Process for Handling Discrimination Issues," SECY-02-0166 (Mar. 26, 2003).

specific facts at issue, it would be appropriate and important for the Commission to exercise its review responsibility with respect to these issues.

C. The majority decision raises substantial questions of law and policy.[9] The majority threatens to eviscerate § 50.7(d). It sets a legal and evidentiary standard that would support a finding of discrimination in any case involving dual inferences (or even conflicting inferences), much less dual motives. That is to say, the standard would support a finding of violation in almost any case. In the real world, the pressure placed on managers by such a regime would be substantial, infringing on management's prerogatives and on its ability to restructure its organizations or to hold employees accountable for legitimate performance issues. The majority approach would allow inferences – drawn from nothing more than minor deviations or subjectivities that are present in any human process – to compel a finding of a violation, even in the case of clear evidence of legitimate business reasons.

For example, the majority criticized the membership makeup of the SRB before which Mr. Fiser appeared and the questions selected by that board (dec. at 62-63). However, the SRB was established in accordance with established TVAN practice and the questions were selected based on their view of the issues important to TVAN. It was inappropriate for the Board to inject itself into the discretionary domain of management by suggesting that different procedures should have been used, that different questions should have been asked, and that different issues should have been of greater importance to the licensee, TVA.

The majority also examined how TVAN applies its personnel procedures in a reorganization to determine if positions must be advertised (dec. at 50-51). However, it failed to accord proper deference to management's decisions on how to conduct its business. The majority improperly secondguesses reasonable business decisions (including decisions by Human Resources professionals) which are better left to company management. In suggesting alternatives that would have made the process "fairer" to Mr. Fiser, the majority improperly requires TVA, and other licensees, to treat employees who have engaged in protected activity more favorably than those employees who have not.

The majority approach, as observed by the dissent, creates the "potential for abuse of the § 211 and § 50.7 protections" and "counterproductive results . . . on the part of management attempting to improve operational and safety performance and best utilize the skills of personnel" (dec. at 81). The majority decision—which confuses discrimination with holding employees accountable for poor

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9 The majority makes a gratuitous finding that TVA "fosters a work environment hostile toward whistle blowers" (dec. at 33). This is based on generalizations by a very limited number of employees, which were not necessarily related to the raising of nuclear safety issues, and which are clearly unrelated to Mr. Fiser's protected activity. The Commission has already rejected an attempt to regulate safety culture in a vacuum as necessarily too subjective (SECY-02-0166). As the dissent pointed out, the attitudes of those few employees had no relevance to Mr. Fiser's protected activities or the adverse action he incurred (dec. at 81-82).

performance—would hamstring legitimate management action to improve plant performance. This proceeding is a case in point. Years before the challenged 1996 nonselection of Mr. Fiser, he was removed from his position at Sequoyah Nuclear Plant based on the performance of his organization and his responsibility as Chemistry manager. Management was, as the undisputed evidence shows, dissatisfied with Mr. Fiser's performance, not because he identified or reported safety issues, but because the organization of which he was the manager had recurrent problems. The ongoing problems were noted by the dissent (dec. at 77-78), were testified to by the then plant manager and licensing manager, and were documented in Mr. Fiser's performance evaluations and reports by the Institute of Nuclear Power Operations (INPO) and by TVA's Nuclear Safety Review Board (NSRB). However, the majority conflates that performance issue with discrimination and effectively dictates in hindsight that Mr. Fiser should have been selected over other qualified candidates who were rated significantly higher by the SRB.

In sum, the majority raises important questions of law and makes new pronouncements on the interpretation of § 50.7 which significantly differ from the regulatory language and which could profoundly affect the industry. Even the majority acknowledges that it was imposing a standard not previously announced (dec. at 5, 67). These improper decisions will effectively require TVA and other licensees to treat employees who have engaged in protected activity more favorably than those employees who have not. These are clearly matters for Commission review.

IV. CONCLUSION

Based on the foregoing reasons and authorities, the Commission should grant review of the Board's decision.

Respectfully submitted,

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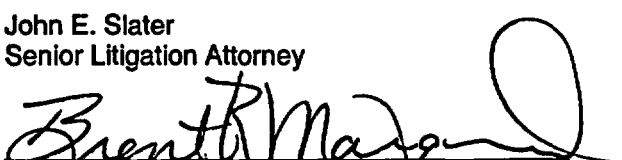

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been served by overnight messenger on the persons listed below. Copies of the document have also been sent by e-mail to those persons listed below with e-mail addresses.

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This 16th day of July, 2003.

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