RAS 6659

NUCLEAR ENERGY INSTITUTE

Ellen C. Ginsberg
Deputy General Counsel

July 28, 2003

BY MESSENGER

Ms. Annette Vietti-Cook
Secretary
U.S. Nuclear Regulatory Commission
Room 16 H3, Mail Stop 0-16 C1
One White Flint North
11555 Rockville Pike
Rockville, Maryland 20852-2738

Re: In the Matter of Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 & 2; Browns Ferry Nuclear Plant, Units 1, 2, & 3) - ASLBP No. 01-791-01-CivP - EA 99-234

Dear Ms. Vietti-Cook:

We are enclosing for filing the original and two copies of the following documents which have been served on all appropriate parties as evidenced by the certificate of service:

REQUEST OF THE NUCLEAR ENERGY INSTITUTE
FOR LEAVE TO FILE AN ANSWER IN SUPPORT OF
COMMISSION REVIEW OF INITIAL DECISION IN LBP-03-10

NUCLEAR ENERGY INSTITUTE'S ANSWER IN SUPPORT OF TVA'S
PETITION FOR REVIEW OF INITIAL DECISION IN
LBP-03-10

Sincerely yours,

Ellen C. Ginsberg

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Enclosures
cc: w/ Enclosure Service List

Template = SECY-041

SECY-02

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. 01-792-01-CivP
Sequoyah Nuclear Plant, Units 1 & 2;	)	
Browns Ferry Nuclear Plant,	)	EA 99-234
Units 1, 2, &3)	)	

REQUEST OF THE NUCLEAR ENERGY INSTITUTE FOR LEAVE TO FILE AN ANSWER IN SUPPORT OF COMMISSION REVIEW OF INITIAL DECISION IN LBP-03-10

On June 26, 2003, the Atomic Safety and Licensing Board (Licensing Board) issued an Initial Decision, denominated LBP-03-10, in response to Tennessee Valley Authority's (TVA) challenge to the Nuclear Regulatory Commission's (Commission) February 7, 2000, Notice of Violation, EA 99-234 (NOV or EA 99-234) and a May 4, 2001, Order imposing a civil penalty of $110,000 for an alleged violation of 10 CFR § 50.7. On July 16, 2003, TVA petitioned the Commission for review of the Licensing Board's Initial Decision.

Based on a request for Commission review by a party pursuant to 10 CFR § 2.786(b)(1), 10 CFR § 2.786(b)(3) permits "any other party to the proceeding" to file

an answer supporting or opposing Commission review.[1] While not a party, NEI participated in the proceeding before the Licensing Board as *amicus curiae* in support of TVA's challenge to the proposed enforcement action and attendant civil penalty.

NEI's *amicus* brief set forth deficiencies in the legal standard developed by NRC Staff for discrimination cases under 10 CFR § 50.7, and applied in the TVA case. NEI identified several policy issues created by the Staff's deviation from the legal standard mandated by Congress under Section 211 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851. More particularly, NEI's brief responded to the Licensing Board's Orders dated January 30, and February 13, 2002, requesting the parties submit briefs on, *inter alia*, the definition of protected activities in NRC discrimination cases, the standard of proof in "dual motive" cases, and the relevance of Department of Labor "remedy" case law.

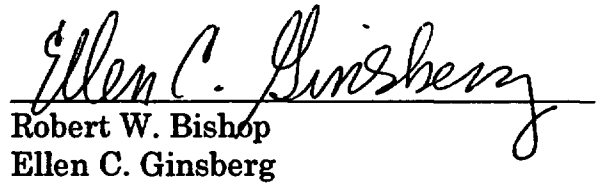
The Licensing Board's Initial Decision in this case includes both a majority decision and a dissent. The majority noted that the Licensing Board "considered NEI's analyses, as well as TVA's and the Staff's, in reaching our legal conclusions . . . ." (init. dec. at 9). Judge Young's dissent is consistent with several of the arguments NEI propounded in its brief and, in large measure, affirmed the reasonableness of NEI's expressed concerns regarding the potential negative impact of the failure to require that the Staff prove a discrimination violation by a preponderance of the evidence. (init. dec. at 76 *et seq*).

[1] 10 CFR § 2.786(b)(3) specifies that an answer is to be filed within 10 days after service of a petition for review. NEI's answer is being filed in compliance with that deadline.

On behalf of the industry, NEI has expressed serious and longstanding concerns regarding the basis for NRC enforcement action for an alleged violation of Section 50.7. The Licensing Board has adopted the NRC Staff's revised legal standard for Section 50.7 cases—which the majority explicitly confirms is a *new* standard (init. dec. at 3). Having now been sanctioned by the Licensing Board, but not having undergone Commission review, this standard is to be applied in cases of alleged discrimination under 10 CFR § 50.7. Thus, it is critically important to the nuclear industry that the Commission thoroughly and deliberately review the Licensing Board's decision to ascertain whether the legal and policy determinations made by the Licensing Board comport with the Commission's views, particularly given the dramatic differences expressed in the decision below.

In sum, as the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, and because NEI participated as *amicus curiae* in this proceeding and the majority and dissent have expressly considered and addressed the issues NEI set forth, NEI respectfully requests that the Commission accept its answer in support of TVA's petition for Commission review of the Licensing Board's initial decision. The substantive bases for requesting Commission review are set forth in the answer enclosed herewith.

Respectfully submitted,



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Dated: July 28, 2003

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NUCLEAR REGULATORY COMMISSION

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Units 1, 2, &3)	)	

NUCLEAR ENERGY INSTITUTE'S ANSWER IN SUPPORT OF TVA'S PETITION FOR REVIEW OF INITIAL DECISION IN LBP-03-10

July 28, 2003

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Units 1, 2, &3)	)	

NUCLEAR ENERGY INSTITUTE'S ANSWER IN SUPPORT OF TVA'S PETITION FOR REVIEW OF INITIAL DECISION IN LBP-03-10

Introduction

On June 26, 2003, the Atomic Safety and Licensing Board (Licensing Board) issued an Initial Decision, denominated LBP-03-10, in response to Tennessee Valley Authority's (TVA) challenge to the Nuclear Regulatory Commission's February 7, 2000, Notice of Violation, EA 99-234 (NOV or EA 99-234) and May 4, 2001, Order imposing a civil penalty of $110,000 for an alleged violation of 10 CFR § 50.7. On July 16, 2003, TVA petitioned the Commission for review of the Licensing Board's Initial Decision. NEI, on behalf of the nuclear industry, hereby supports TVA's petition requesting the Commission undertake review of the Board's Initial Decision in LBP-03-10. That decision addresses legal questions for which there is no

Commission precedent. Moreover, the matters raised therein present important questions of policy and law of significance to the entire nuclear energy industry.

TVA initiated the proceeding before the Licensing Board to challenge the NRC's Order and the associated civil penalty for an alleged violation of 10 CFR § 50.7 because TVA did not select Gary Fiser (a former employee who had engaged in protected activity) for a competitive position. After conducting a full evidentiary hearing, the Licensing Board ruled that TVA's failure to select Mr. Fiser violated Section 50.7.

Commission review is necessary in this case because the Licensing Board decision sanctions new legal standards developed by the Staff which would fundamentally revise the NRC's approach to enforcement of alleged violations of 10 CFR § 50.7. The Licensing Board's decision should not be permitted to become agency precedent without thorough and deliberate Commission review. The need for review is further evidenced by the dramatically differing opinions expressed in the majority and dissent regarding the proper analysis and legal standard to be applied to Section 50.7 cases.

Discussion

The Licensing Board majority found, as TVA had contended, that TVA's non-selection of Mr. Fiser occurred as part of a "massive" reorganization in 1996 affecting most of TVA's nuclear functions (init. dec. at 47-48); that TVA's reorganization was not undertaken for the purpose of carrying out discriminatory action against any individual, including Mr. Fiser (init. dec. at 48); and that,

specifically with respect to Mr. Fiser, his non-selection was largely founded on "seemingly significant performance-oriented reasons" (init. dec. at 4). Despite affirming TVA's bases for its action, and in effect finding there was no evidence that TVA's explanation for its reorganization and non-selection of Mr. Fiser was a "pretext" for its action, the majority concluded that TVA had a "dual motive" for failing to select Mr. Fiser (init. dec. at 13, 63). Based on the "dual motive" finding, but without determining whether any such "dual motive" meaningfully contributed to the non-selection of Mr. Fiser, the majority affirmed the NRC Staff's position that TVA's action was a violation of Section 50.7.

After having found a violation, the majority nevertheless reduced the amount of the civil penalty by 60%, offering two reasons for doing so. The first is the Licensing Board's acknowledgement that TVA's failure to retain Mr. Fiser appeared to have been premised on TVA's view of Mr. Fiser's work history and that his alleged protected activities played no more than a "minor role" in his non-selection (init. dec. at 67). The second is the majority's acknowledgement—as TVA and the industry have been contending for the past several years—that the Staff has adopted a *new* interpretation of what constitutes protected activity, and *new* evidentiary and legal standards for demonstrating the necessary causal nexus between protected activity and adverse action (init. dec. at 68).

Among other issues, Judge Young's dissent challenges the majority's failure to apply the long-established preponderance of evidence standard to the facts of this case. The dissent illuminates—as did NEI in its *amicus* brief—practical implications of the majority approach, which fails to require a showing, by a

preponderance of evidence, that adverse action was taken *because* the employee engaged in protected activity.

Given the dramatic differences of opinion among the members of the Licensing Board, and the industry's ongoing concerns regarding the Staff's handling of enforcement for alleged violations of 10 CFR § 50.7, the decision in this case should prompt the Commission to clarify how it intends this regulation to be applied.

A. The decision raises issues for which there is no Commission precedent.

The Commission should directly address whether, in analyzing alleged violations of Section 50.7, it expressly intends to reject the approach used in analyzing cases under Section 211 of the Energy Reorganization Act. The majority ruled that Section 211 case law should be construed as guidance only, and subsequently ignored the shifting burdens of proof used in that case law. The majority instead merely articulated the four elements of a *prima facie* case of a violation of Section 50.7 drawn from the Staff's Millstone Independent Review Team Report (MIRT Report) (init. dec. at 16-17, 71). The majority made no attempt to analyze or articulate the appropriate evidentiary standard for demonstrating that the causation element had been proven.

Compounding this problem is the majority's failure to include in its analysis any requirement for the NRC Staff to prove, by a preponderance of the evidence, that the employer's proffered reasons were "pretextual" and, if they were, that any discriminatory motive was at least a "contributing factor" upon which the adverse

action was based. The result of this truncated analysis, sanctioned by the Licensing Board, in effect, is to improperly shift the burden of proof to the employer, requiring it to show the any adverse action was based solely on non-discriminatory reasons (init. dec. at 13).

The majority analysis begs the question of whether the Staff has shown, by a preponderance of the evidence, that there was a "dual motive." Additionally, even assuming a "dual motive" existed, the Commission should address the quantum of evidence that is necessary to prove a causal nexus between any discriminatory motive and the eventual adverse action (in order to sustain an enforcement action for an alleged violation of Section 50.7). The Staff's own MIRT Report seeks a demonstration of affirmative causation based on something more than an inference drawn from mere knowledge of the protected activity.

> 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. (MIRT Report at 8).

Judge Young's dissent points out 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" (init. dec. at 71; emphasis in original).

B. The decision raises substantial issues of law and policy.

The Licensing Board's decision means that a violation of Section 50.7 can be supported by *any* inference of *any* discriminatory motive, irrespective of whether that motive is proven by a preponderance of the evidence, and irrespective of whether any such motive is proven to be at least a "contributing factor" to the adverse personnel action, This decision is at odds with Section 50.7(d) because it eliminates the current requirement for a showing of causation or intent (i.e., Section 50.7(d) provides that the "prohibition applies when the adverse action occurs because the employee has engaged in protected activity).[1] The Commission should determine whether it intends to modify Section 50.7(d) to conform to the Licensing Board's decision. This can only be done pursuant to notice and comment rulemaking.[2]

The legal standard to be applied in evaluating allegations of discrimination has significant implications for the industry. Adoption of the Licensing Board's approach to Section 50.7(d) may greatly affect licensee managers and, in turn, be counterproductive from a safety standpoint. Specifically, a broadened standard of what evidence establishes discrimination may affect a manager's willingness to make difficult personnel decisions necessary to address deficient human performance, to make organizational changes to maintain operational excellence, or

[1] NEI is not suggesting that, even in a dual motive case, that any amount of discrimination is acceptable. The industry's view is that because this is an area which is often difficult to evaluate in retrospect, a mere inference of any discriminatory animus should not, as a matter of policy, as well as a matter of law, be considered sufficient to find discrimination.

[2] Similarly, the Commission should decide whether the scope of protected activity under § 50.7 should be enlarged, as is done by this decision, to include engaging in the resolution of an identified safety-related issue.

to implement reorganizations/realignments in order to improve the efficiency and effectiveness of nuclear-related work groups. Judge Young acknowledged the reasonableness of these concerns in her dissent:

> "[I]n this case, I would find sustaining the Order to create a potential for abuse of the § 211 and § 50.7 protections, for resulting possible erosion of confidence in the process by those with truly legitimate concerns, and for possible counterproductive results as well, to an extent, on the part of management attempting to improve operational and safety performance and best utilize the skills of personnel, as in effect argued by TVA and NEI" (init. dec. at 81).

Accordingly, the Commission is now called upon to establish the appropriate legal and evidentiary standards to be applied in alleged discrimination cases pursuant to 10 CFR § 50.7. The NRC should, as a result of its review, require the Staff to apply the more rigorous analysis of analogous discrimination case law, which more properly balances competing policy objectives than the construct articulated in the Licensing Board decision.

Further, the Commission should grant review of this decision to ensure that it scrutinizes the new Staff interpretations that significantly affect licensees and their legal rights when discrimination is alleged. The Staff's new legal and evidentiary standards to be applied in Section 50.7 cases should not be permitted to become agency precedent without being subjected to this kind of deliberate Commission review. To do otherwise would allow Staff fundamentally to revise agency policy through enforcement action.

Conclusion

For the foregoing reasons, the Commission should grant TVA's request for review of the Board's Initial Decision in LBP-03-10.

July 28, 2003

Respectfully submitted,

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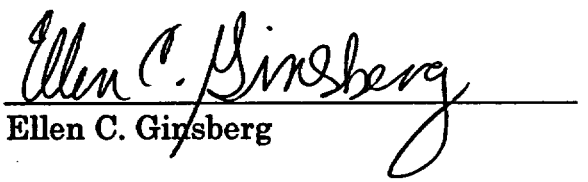

Ellen C. Ginsberg

CERTIFICATE OF SERVICE

I hereby certify that the foregoing documents have been served by messenger on the persons listed below. Copies of the documents have been sent by U.S. mail, first class to those persons as indicated below.

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This 28th day of July, 2003.

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