RAS 7038

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)	)	

BRIEF AMICUS CURIAE OF THE NUCLEAR ENERGY INSTITUTE ON THE ISSUE OF CIVIL PENALTY MITIGATION

November 5, 2003

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I. INTRODUCTION

In its Initial Decision, the Atomic Safety and Licensing Board (Licensing Board) majority affirmed the NRC Staff's finding that TVA had violated 10 C.F.R. § 50.7, but ordered a 60 percent reduction in the associated civil penalty. *See Tennessee Valley Auth.* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 & 2; Browns Ferry Nuclear Plant, Units 1, 2, & 3), LBP-03-10, 57 NRC 553, 553 (2003). Based on the Staff's filing in response to TVA's Petition for Review, the Commission requested briefs on the standard to be applied by a Licensing Board in mitigating a civil penalty in a discrimination case.[1] *See* CLI-03-09, 57 NRC __, slip op. at 7.

In summary, a Licensing Board's mitigation authority is found in 10 C.F.R.

[1] While stating that the standard to be applied to mitigation of a civil penalty is the "kind of question which the Staff should have proffered in a Petition for Review of its own," rather than in response to TVA's Petition for Review, the Commission nevertheless recognized its significance and that the Commission had not previously addressed the mitigation question. *Id.*, slip op. at 4, 5.

§ 2.205(f), which provides an opportunity for a licensee to challenge an enforcement action in an adjudicatory hearing, and in the "exercise of discretion" authority embodied in the NRC Enforcement Policy. *See* NUREG-1600, "General Statement of Policy and Procedure for NRC Enforcement Actions" (Enforcement Policy — May 1, 2000). Because a hearing on an enforcement action is a *de novo* review, Licensing Boards have complete discretion to affirm a civil penalty amount proposed by the Staff, recommend imposition of a lesser civil penalty amount, or determine that no civil penalty should be imposed. To limit Licensing Boards in the manner argued by the Staff would deny licensees a full and fair hearing on all aspects of a proposed enforcement action and would permit the Staff to implement the Commission's Enforcement Policy without proper oversight from either a Licensing Board or the Commission itself.

II. ARGUMENT

A. Licensing Board Authority to Mitigate a Civil Penalty

There should be no debate about a Licensing Board's authority to mitigate a civil penalty. 10 C.F.R. § 2.205(f) explicitly provides that, if a hearing is held, an order will be issued "dismissing the proceeding or imposing, mitigating, or remitting the civil penalty." Case law elaborates on this provision. The Staff itself calls attention to *Atlantic Research Corp.*, ALAB-594, 11 NRC 841, 849 (1980), in which the "Appeal Board held that it could substitute its judgment for that of the Staff in determining the appropriate penalty for a violation." Staff Brief at 8. *Radiation Tech., Inc.*, a case not cited by the Staff, earlier had settled the question of whether a Licensing Board could mitigate a civil penalty imposed by the NRC Staff:

> The Director [of Enforcement] is not the ultimate fact finder in civil penalty matters. Commission regulations afford one from whom a civil penalty is sought the right to a hearing on the charges against it. At that hearing, the Director must prove his allegations by a preponderance of the reliable, probative, and substantial evidence. *It is the presiding officer at that hearing, not the Director, who finally determines on the basis of the hearing record whether the charges are sustained and the civil penalties warranted.* ALAB-567, 10 NRC 533, 536-37 (1979) (citations omitted) (emphasis added).

The decisions in *Radiation Tech.* and *Atlantic Research* clearly established that enforcement proceedings involve a *de novo* review in which the Licensing Board has the authority to review the Staff's basis for finding a violation and its proposed civil penalty. Thus, it is without either legal basis or logic to suggest, as the Staff does, that a Licensing Board has authority to conduct a *de novo* review but may not mitigate the civil penalty if the Licensing Board reaches a conclusion on the civil penalty amount that is different from that proposed by the Staff.[2]

The Staff also argues that the adoption of the Enforcement Policy subsequent to the issuance of the *Radiation Tech.* decision somehow affects the authority of the Licensing Board to carry out its *responsibilities* under 10 C.F.R. § 2.205(f). *See* Staff Brief at 8. However, that argument is completely refuted by *Consolidated X-Ray Serv. Corp.*, ALJ-83-2, 17 NRC 693, 705 (1983). Moreover, even the Staff posits that a penalty may be mitigated "if the Staff fails to follow the enforcement policy without adequate justification or the penalty imposed is clearly *unreasonable given the circumstances* . . . ." Staff Brief at 8 (emphasis added). Although the traditional "abuse of discretion standard" is inapt in a *de novo* review, the Staff's construct of this standard would nevertheless lead to the same result in the instant case. Here, the Licensing Board did find, on the basis of its review of the record presented during the hearing, that the civil penalty was "unreasonable given the circumstances." The Staff simply disagrees with that determination. *See id.* at 3-5.

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[2] As TVA also notes in its brief at footnote 3, *Radiation Tech.* shines a bright light on the Staff's previous position on the standard to be applied in an enforcement review. The Staff's earlier position is irreconcilable with the abuse of discretion standard now urged by Staff. The decision illuminates why, then as now, a *de novo* standard of review should be applied in these cases.

> [T]he staff pointed out that, '[o]nce that Licensee requested a hearing, it became the responsibility and duty of the . . . Administrative Law Judge to decide the case anew. The Director was no longer the decisionmaker.' Upon the receipt of all of the evidence bearing upon the existence of the alleged violations and 'any mitigating circumstances,' '[t]he Administrative Law Judge then had to arrive at a decision on whether the violations occurred, [and] whether and in what amount a civil penalty should be imposed.'

Atlantic Research, 11 NRC at 848 (discussing *Radiation Tech.*) (emphasis in original).

The Staff also argues that it could have issued more individual violations to TVA and imposed greater penalties for the violations it did issue under the guidance of the Enforcement Policy, but exercised its discretion not to do so. *See id.* at 8. Implicitly, the Staff suggests that its self-declared leniency necessarily renders the civil penalty amount reasonable and, therefore, not subject to mitigation by the Licensing Board. This argument, too, is without legal basis or logic. In fact, it is absurd.

B. Affirming a Violation Does Not Require Retaining the Civil Penalty

Throughout its brief on mitigation, the Staff maintains that the Licensing Board is wrong with respect to its finding regarding "particularly the small role that protected activities may have played in leading to the adverse action." *Tennessee Valley Auth.*, 57 NRC at 607. The Staff argues that "[t]here is no such thing as a partial violation of a regulation; a licensee is either in compliance or it's not." Staff Brief at 2. We agree with the Staff on this point. However, it does not follow that a finding of a violation also requires that the civil penalty proposed by the Staff must be retained. Rather than employing a "'comparative negligence' type system," as it was characterized by the Staff (Staff Brief at 3),[3] the Licensing Board appropriately exercised its discretion under the Enforcement Policy to "ensure that the proposed civil penalty reflects all relevant circumstances of the particular case." *See* NUREG-1600, Sec. VI.C.2.d. Thus, the Licensing Board's actions comport with the dictates of the Enforcement Policy, which the Staff itself argues is determinative.

[3] More apt than the Staff's "comparative negligence" analogy would have been an analogy between the Enforcement Policy and federal sentencing guidelines, because the Staff's enforcement role is akin to that of the prosecution making a penalty recommendation in a criminal case. Sentencing guidelines allow a judge to impose a sentence within an established range, *but do not bind the judge to that which the prosecution has recommended.* We note in this regard that the Enforcement Policy and Section 2.205 go further, permitting Licensing Boards and the Commission to exercise full discretion to mitigate a civil penalty based on "all relevant circumstances of the particular case." NUREG-1600, Sec. VI.C.2.d.

C. Failure to Provide Adequate Notice

The Staff argues that TVA was given adequate notice of the legal standard the agency would apply to discrimination cases at the time TVA allegedly violated 10 C.F.R. § 50.7. See Staff Brief at 5-7. The Staff chastises NEI for somehow being "misled into thinking a little discrimination was acceptable" (which we do not), and argues further that that is "not an appropriate basis to mitigate the penalty in this case." *Id.* at 6. The Staff argues that, based on NEI's failure to properly read case law distinguishing between violations and remedies, NEI should not be heard to argue that the Licensing Board properly mitigated the penalty in the instant case. *See id.* On this basis, and because "TVA has maintained throughout the proceeding that they did not consider Fiser's protected activities in taking any actions," the Staff concludes "it is hard to see how [TVA] would be harmed" by the Staff's revised interpretation of Section 50.7. *Id.*

The Staff's glibness is very disturbing. It is axiomatic that when a federal agency takes enforcement, or any action based on a revised interpretation of its statute or regulation, the regulated community is not only entitled to know, but it is the agency's legal obligation to provide notice of the revised interpretation. The agency's own backfit rule is testament to the importance of adequate notice. *See* 10 C.F.R. § 50.109. And, contrary to the Staff's argument, the lack of notice is an appropriate basis for the Licensing Board's mitigation of the instant civil penalty.

III. CONCLUSION

Based on the foregoing, the Commission should reject the Staff's position regarding a Licensing Board's authority to mitigate a civil penalty in a *de novo* review.

November 5, 2003

Respectfully submitted,

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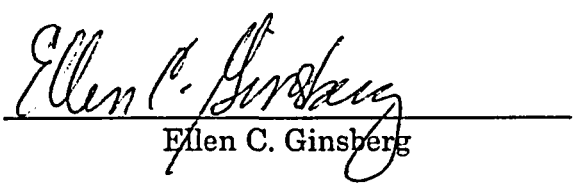

Ellen C. Ginsberg

CERTIFICATE OF SERVICE

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

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This 5th day of November, 2003.

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November 5, 2003

BY MESSENGER

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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:

Enclosed please find for filing the original and two copies of the Brief Amicus Curiae of the Nuclear Energy Institute on the Issue of Civil Penalty Mitigation. A copy of the brief has been served on all parties listed on the certificate of service.

Sincerely yours,

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Enclosures
cc (w/ Enclosures): Service List