UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF RESPONSE TO TENNESSEE VALLEY AUTHORITY'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL AUTHORITIES

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.730(c) of the Commission's regulations, the NRC Staff (hereinafter "Staff") now responds to "Tennessee Valley Authority's Motion For Leave to File Supplemental Authorities" ("Motion to Supplement") dated December 17, 2003. As more fully explained below, the Staff opposes this motion.

BACKGROUND

On July 16, 2003, Tennessee Valley Authority ("TVA") filed a Petition for Review of Initial Decision in LBP-03-10.[1] The Commission granted that Petition for Review in its Memorandum and Order, CLI-03-09, dated August 28, 2003. Pursuant to CLI-03-09, TVA filed its Initial Brief on October 2, 2003. The Staff filed a response on November 3. 2003,[2] to which TVA replied on

[1]LBP-03-10, Initial Decision ("ID"), dated June 26, 2003 upheld a Staff finding that TVA had discriminated against an employee in violation of 10 C.F.R. § 50.7.

[2]*See* NRC Staff Reply to Initial Briefs of the Tennessee Valley Authority and the Nuclear Energy Institute, November 3, 2003.

November 24, 2003.[3] On December 17, 2003, TVA filed its Motion to Supplement requesting leave to file a Citation of Supplemental Authorities (which was attached to the Motion to Supplement). TVA claims that the proffered supplemental authorities are directly pertinent to the central issues in this proceeding. The Staff now responds to TVA's Motion to Supplement.

DISCUSSION

1. The Cases Offered By TVA Are Not Directly Pertinent To The Current Proceeding

The first case offered by TVA is *Raytheon Co. v. Hernandez*, 124 S. Ct. 513, 540 U.S. __, (Dec. 2, 2003). TVA asserts that *Raytheon* mandates the use of a *McDonnell Douglas* type analysis[4] in the current proceeding. This, however, will not affect the outcome of this proceeding because the Board did in fact use such an analysis, finding that the Staff had met each of the *McDonnell Douglas* elements for establishing a prima facie case (ID at 60-64). TVA also points to *Raytheon's* finding that a neutral no-rehire policy is a legitimate nondiscriminatory reason, but this is irrelevant because the court in *Raytheon* also noted that there must be a finding that the employer had actually applied such a policy. In this case, the Board found that TVA had not properly applied its allegedly neutral RIF procedures, and that if it had Mr. Fiser would have been retained. ID at 67. Finally, TVA notes *Raytheon's* statement that where a decision maker is unaware of a disability, it is impossible for her decision to have been based on that disability. This holding is irrelevant in the current case because the Board specifically found that members of TVA management were aware of Fiser's participation in protected activities. ID at 61.

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[3] *See* Tennessee Valley Authority's Reply Brief, November 24, 2003.

[4] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

TVA next offers *Pickett v. TVA*, 01-CAA-18 (ARB Nov. 28, 2003). TVA seems to believe that this case alters *Earwood's*[5] rule prohibiting improper references to an employee's protected activity. This case is irrelevant for two reasons. First, *Pickett* does not involve an employer making reference to an employee's protected activity as was the case here.[6] Second, the ARB, in *Pickett*, cited both *Garballa and Earwood*. In doing so it gave no indication that it intended to overturn or modify those rulings.

TVA next seeks to supplement the record with *Cerutti v. BASF Corp.*, 02-3471, 2003 U.S. App. LEXIS 23789 (7th Cir. Nov. 21, 2003). TVA believes that this case sheds light on the use of circumstantial evidence to prove discrimination.[7] In *Cerutti*, the court distinguishes between proving discrimination directly and proving it indirectly. While TVA appears to agree that this is an indirect (i.e. *McDonnell Douglas*) case,[8] it then points to statements made by the court in the context of discussing standards of proof under the direct approach. The court's discussions of stray workplace remarks and remoteness in time both occurred during the court's analysis under the direct standard.[9] Because the Staff proved discrimination indirectly (*i.e.* using the *McDonnell*

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[5]*Earwood v. Dart Container Corp.*, 93-STA-0016 (Sec'y Dec. 7, 1994).

[6]In fact, *Pickett* recognizes that there was a different result where the employer explicitly mentioned the employee's whistleblower complaint. *Pickett* at 7, *citing Garballa v. Arizona Public Service Co. and The Atlantic Group*, 94-ERA-9, (Sec'y Jan. 18, 1996).

[7]TVA seems to confuse the method of proving discrimination (i.e. directly or indirectly) with the concept of "dual motive" discrimination. Dual-motive simply refers to a case where an adverse action may have been premised both on the employer's legitimate reasons as well as on the employee's protected activities. Discrimination in such a case can be proven by direct evidence or indirect evidence just like in other discrimination cases. *See* ID at 12 for a discussion of the significance of a dual-motive case.

[8]One of the reasons that TVA feels it is necessary to supplement the record with *Raytheon* is to show that the Board should have used a *McDonnell Douglas* analysis. Motion to Supplement at 4.

[9]*Cerutti* at 10-12 and 17-18. Remoteness in time and workplace remarks were not mentioned in the court's analysis under the indirect standard.

Douglas approach), *Cerutti's* discussions of stray workplace remarks and remoteness in time are irrelevant to the current proceeding. Even if these statements did apply to an indirect analysis, they would not be decisive in the current case because the remarks at issue in *Cerutti* were not statements about protected activity and the Board explicitly noted that the Staff did not rely primarily on temporal proximity to prove discrimination, pointing out its reliance on several other independent bases. ID at 15.

TVA also highlights *Cerutti's* holding that courts should not second guess management on the processes used to determine employment qualifications. This holding has no relevance in the present case because in *Cerutti* the court also specifically found that the employer had not applied its processes in a discriminatory manner. *Cerutti* at 16 and 19. The Board, however, found that TVA had applied its processes in a disparate manner and that if it had not manipulated personnel regulations, Fiser would have been retained. ID at 51-53 and 67.

Finally, TVA seeks to introduce *Crosby v. Hughes Aircraft Co.*, 85-TSC-2 (Sec'y Aug. 17, 1993), *aff'd sub nom Crosby v. U.S. Dep't of Labor*, No. 93-70834, 1995 U.S. App. LEXIS 9164 (9th Cir. Apr. 20, 1995). TVA believes that, under *Crosby*, the refusal to carry out an assignment may not be protected activity where the employee's assumptions are too numerous and too speculative to form the basis for a reasonable perception of a violation. However, the questions addressed in *Crosby* are whether an employee's quality complaints are protected activity and whether refusal to work is a legitimate reason for discharge (not whether it is a protected activity). Because *Crosby* does not address whether refusal to work can be a protected activity and because Fiser never refused to do work, it is irrelevant.[10] In addition, this case is irrelevant to the current proceedings because TVA has never argued that Fiser's perception of a potential regulatory

[10]Fiser did not refuse to perform trending. The same trending was performed before and after his encounter with McGrath. What he did do was refuse to adopt mandatory procedures that TVA could not comply with, and which would result in regulatory violations.

violation was not reasonable or that it was based on numerous or speculative assumptions.[11] TVA should not be allowed to raise a new argument at this late stage in the proceedings.

The Staff also notes that *Crosby* was decided more than ten years ago. While TVA states that it was unaware of this authority at the time that it filed its last brief on November 24, 2003, it does not offer any explanation for not locating the case earlier.[12] Unless TVA can show that, for some compelling reason, it could not have found this case earlier by using reasonable effort, it should not be allowed to bring it in this late in the proceeding.

As discussed above, the cases cited by TVA are not relevant to the current proceeding. Thus they are not controlling authority and would not be outcome determinative.[13] To use these cases to persuade the Commission, TVA should have cited them in its earlier filings or must now make a showing that it can meet the criteria for reopening the record under 10 C.F.R. § 2.734(a). Allowing TVA to introduce any case that it stumbles upon and feels may be somehow tangentially related to the proceeding, even after filing deadlines have passed, will result in needless delay to the proceeding without actually enhancing the record.[14]

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[11]*See* Tennessee Valley Authority's Posthearing Proposed Findings of Fact and Conclusions of Law, dated December 20, 2003 at 54-55, ¶¶ 4.28-4.29. The issue of Fiser's refusal adopt mandatory procedures requiring daily trending was not raised in [TVA]'s Initial Brief dated October 2, 2003 or in [TVA]'s Reply Brief dated November 24, 2003.

[12]Motion to Supplement at 1.

[13]In addition one of the proffered cases is a Department of Labor decision, which the Staff believes is not binding on the Commission, and two of the cases were decided by Circuit Courts to which the present proceeding cannot be appealed under § 189(b) of the Atomic Energy Act of 1954, as amended and 28 U.S.C.A. § 2343.

[14]In support of its Motion to Supplement, TVA also cites Federal Rule of Appellate Procedure 28 (j), which permits the citation of supplemental authorities. While this rule is not binding on the Commission, it may provide guidance. However, rule 28(j) provides no support for TVA's Motion to Supplement because it applies only to controlling legal authorities. *See Philips Medical Systems Intern., B.V. v. Bruetman*, 982 F.2d 211, 215 n.2 (7th Cir 1992). There is an exception to this rule where a proceeding in another court is directly related (*i.e.* involving a common party or issue). *Id. See also U.S. v. Hope*, 906 F.2d 254, 261 n.1 (7th Cir. 1990) and

(continued...)

2. TVA's Motion Contains Substantive Arguments

Contrary to TVA's assertion that it "has cited these authorities without argument,"[15] TVA actually attaches several pages in which it argues its interpretation of the proposed supplemental authorities. Supplementing the record as TVA requests would allow TVA to slip substantive arguments in through the back door without allowing the Staff an opportunity to respond. TVA's Motion to Supplement should be denied because it goes beyond merely calling the Commission's attention to supplemental authorities and makes substantive arguments.

CONCLUSION

Because the supplemental authorities proffered by TVA would not be controlling authority in the current proceeding and because TVA has not made a showing that it meets the 10 C.F.R. § 2.734(a) criteria for reopening the record, the Staff respectfully requests that the Commission deny TVA's Motion for Leave to File Supplemental Authorities.

Respectfully submitted,

/RA/

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/RA/

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Dated at Rockville, Maryland
this 31st day of December, 2003

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[14](...continued)
Green V. Warden, U.S. Penitentiary, 699 F.2d 364, 369 (7th Cir. 1983)

[15]Motion to Supplement at 1.

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	)	EA 99-234

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO TENNESSEE VALLEY AUTHORITY'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL AUTHORITIES" in the above-captioned proceeding have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), or by electronic mail as indicated by a double asterisk (**) on this 31st day of December, 2003.

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