

U.S DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES

SAPORITO ENERGY CONSULTANTS and )  
THOMAS SAPORITO )  
 )  
Complainants, )  
 )  
v. )  
 )  
U.S. NUCLEAR REGULATORY COMMISSION, )  
 )  
Respondent. )  
\_\_\_\_\_ )

Case No. 2009-ERA-00016

March 29, 2010

RESPONDENT U.S. NUCLEAR REGULATORY COMMISSION RESPONSE TO ORDER  
PERMITTING RESPONSE TO REQUEST TO WITHDRAW CLAIM

Respondent U.S. Nuclear Regulatory Commission (NRC or Agency) hereby files its response to Administrative Law Judge Paul C. Johnson's Order of March 15, 2010 permitting a response to Complainant Thomas Saporito's March 7, 2010 request to withdraw his complaint in the above-captioned matter. The Agency does not object to the findings of the Occupational Safety and Health Administration (OSHA) issued September 9, 2009; however, the Agency also believes that Judge Johnson's January 25, 2010 "Order Partially Dismissing Complaint and Permitting Additional Briefing" (Partial Dismissal) provides additional clarity on whether Complainant's allegations against the NRC state a claim for which relief can be granted under Section 211 of the Energy Reorganization Act (Act). The NRC is not aware of a provision in the Department of Labor's rules that would permit the Judge to modify the OSHA findings, though 29 CFR § 24.111(c) does state that the judge "will determine whether to approve the withdrawal."

The OSHA findings of September 9, 2009 (Findings) dismissed the complaints in this case because "Complainants were at no time ever employed by the Respondent or offered employment by the Respondent." Findings at 4. The NRC agrees with this conclusion and has

presented evidence in support of that position during the course of this case. Following the January 25, 2010 Order partially dismissing the complaint, the only issue remaining before Judge Johnson was the NRC's motion for summary judgment related to the question of whether Complainant was ever an applicant for employment. The NRC's position on this issue is reflected in the OSHA findings: the NRC and the Complainant have never had an employment relationship of any kind, and thus Complainant can not make out a *prima facie* case under the Act.

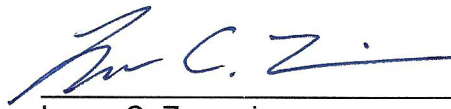
With respect to Complainant's claims that the NRC's failure to take enforcement action can serve as a basis of retaliation, the Partial Dismissal more thoroughly addresses these claims and constitutes an important part of the record in this case. Specifically, the Partial Dismissal makes clear that the NRC's failure to take enforcement action does not constitute retaliation under the Act and that the Department of Labor lacks jurisdiction over the NRC's enforcement decisions. Given that the Complainant's March 7, 2010 withdrawal suggests that the NRC's actions with respect to certain licensees is the reason he is withdrawing his complaint, the conclusions of the Partial Decision are significant.

Finally, the NRC has been evaluating petitions filed by Complainant under 10 CFR § 2.206 against Florida Power and Light (FPL), Exelon and Progress Energy since at least December 2009. These more recent petitions are not factually related to the petitions filed with the NRC that form the basis of the original complaints in this case.<sup>1</sup> If Complainant was satisfied by the NRC's actions with respect to licensees FPL, Exelon and Progress Energy, he could have withdrawn his complaints months ago. Rather, Complainant pursued this matter

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<sup>1</sup> Complainant has filed countless petitions for enforcement under 10 CFR § 2.206 with the NRC over the last several years that have involved numerous NRC licensees and a wide range of issues. It is difficult to discern based on the scant information in Complainant's request to withdraw, which pending petitions have apparently satisfied him, though the three licensees named are currently the subject of open petitions or petitions under consideration brought by the Complainant. However, none of the pending petitions relates to the licensees' refusal to hire the Complainant.

long after the NRC had engaged Complainant regarding his most recent petitions under 10 CFR § 2.206, and in the face of clear legal precedent (including many of the same issues resolved by Judge Johnson in case 2009-ERA-00006) that the grounds for his complaint were baseless.<sup>2</sup> Nonetheless, in the interests of ending this litigation, the Agency does not object to the Complainant's request to withdraw the complaint and the OSHA findings becoming final pursuant to 29 CFR § 24.111(c).



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<sup>2</sup> Although Section 211 of the Energy Reorganization Act does not contain any provision regarding frivolous complaints, the NRC notes that Complainant was recently ordered to pay reasonable attorneys fees, not to exceed \$1000 related to a frivolous complaint he filed under the Consumer Product Safety Improvement Act of 2008 (CPSIA). See Saporito v. Publix Supermarkets, Inc., 2010-CPS-00001, March 5, 2010. In that decision, the judge notes that the Complainant is an experienced litigator in whistleblower matters and that his pursuit of multiple claims against Publix Supermarkets, even after he had been advised that his claims could not be pursued under the CPSIA, demonstrated, at a minimum, bad faith, for which attorneys fees could be recovered under the CPSIA. Id. at 2, 12-14. In many ways, the complaints filed against the NRC by Complainant, specifically 2009-ERA-00006 and 2009-ERA-00016, follow a similar pattern in that the legal issues presented are virtually identical (whether the NRC's refusal to take enforcement action constitutes retaliation under the Act) and equally baseless, and even after receiving an adverse decision on those issues in case 2009-ERA-00006, Complainant continued to raise the same issues in this case.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the RESPONDENT U.S. NUCLEAR REGULATORY COMMISSION RESPONSE TO ORDER PERMITTING RESPONSE TO REQUEST TO WITHDRAW CLAIM was sent on March 29, 2010 to:

By First Class Mail  
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By First Class Mail.  
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