

UNITED STATES OF AMERICA
DEPARTMENT OF LABOR

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

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, Units 1,)	EA 99-234
2 & 3))	
)	

**TENNESSEE VALLEY AUTHORITY'S PREHEARING STATEMENT OF
FACTS AND ISSUES TO BE LITIGATED**

This is an enforcement proceeding arising out of a proposed civil penalty of \$110,000 sought to be imposed by the Nuclear Regulatory Commission (NRC) staff on the Tennessee Valley Authority (TVA) for an alleged violation of NRC's employee-protection requirements set forth in 10 C.F.R. § 50.7 (2001). The proposed civil penalty is based upon alleged discrimination by TVA against Gary L. Fiser, a former TVA employee, for engaging in activities protected by Section 211 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (1994) (ERA). Fiser filed a complaint with the Department of Labor on June 25, 1996, claiming that the creation of new positions in a 1996 reorganization within TVA's nuclear power organization (TVA Nuclear) was intended to discriminate against him in violation of the ERA.

After conducting its own investigation, the NRC Office of Investigations concluded that TVA had discriminated against Fiser in not selecting him for the position he was seeking during the 1996 reorganization and issued a Notice of Violation on

February 7, 2000, proposing a civil penalty. On May 4, 2001, NRC issued an order imposing a civil monetary penalty. As was its right, TVA requested, and has been granted by the Atomic Safety and Licensing Board (Licensing Board), a *de novo* hearing contesting the Notice of Violation. Pursuant to the Licensing Board's June 28, 2001, memorandum and order, TVA files this statement of facts and issues to be litigated that it believes would assist the Licensing Board and the parties in preparing for the prehearing conference scheduled for July 19, 2001. In addition, TVA submits herewith copies of its January 22 and March 9, 2001, responses to the Notice of Violation.

Statement of Facts

1. **Background.** In order to understand the context in which this proceeding arose, some background information is necessary about two major TVA efforts. The first effort relates to major improvements to TVA's nuclear power program. In 1985, TVA voluntarily shut down its Sequoyah Nuclear Plant (Sequoyah) and Browns Ferry Nuclear Plant (Browns Ferry) and voluntarily ceased pursuing an operating license for Unit 1 at Watts Bar Nuclear Plant (Watts Bar) in order to address management and regulatory issues in TVA's nuclear program.

TVA's efforts to upgrade its nuclear program, to restart Sequoyah and Browns Ferry, and to perform the initial startup of Watts Bar required large numbers of TVA employees and contractors. As its nuclear program was upgraded, TVA successfully restarted Sequoyah Units 1 and 2, Browns Ferry Units 2 and 3, and started Watts Bar Unit 1. As work on those five nuclear units was completed and they were placed in full service, the large numbers of nuclear employees and contractors who were working on the upgrade, restart, and construction programs were no longer necessary. As those programs were winding down, TVA adjusted the size of its

nuclear workforce as it changed from a construction and modifications organization to a much smaller operations organization.

The second effort at TVA relates to TVA's goal to hold down electric rates by improving productivity and reducing costs. This effort is driven by the need to become more competitive with other electric utilities in anticipation of deregulation of the electric utility industry.

As a result of both efforts, TVA has reorganized and reduced the number of employees within TVA Nuclear. The changes in the workforce have not occurred all at once; rather, the reductions were implemented in a deliberate step-wise fashion year by year. Thus, during 1994-1997, a number of TVA employees within TVA Nuclear lost their old positions. While some employees were successful in being selected for new positions created as a result of the reorganizations, hundreds of TVA employees involuntarily lost their positions and employment with TVA.

2. Fiser's previous positions with TVA. From 1988 until 1992, Fiser served as Chemistry Manager, PG-9, at Sequoyah.¹ Because of deficiencies in the Sequoyah chemistry program and because management perceived that Fiser had weak management skills, Fiser was rotated to the Corporate Chemistry Manager position in Chattanooga, Tennessee, in 1992. When Fiser continued to display weak leadership, he was removed from the position of Corporate Chemistry Manager and assigned to work as a Chemistry Program Manager in the Corporate Chemistry organization. While still assigned to the management and specialist pay schedule, Fiser no longer had supervisory responsibilities, but provided technical expertise to the plants.

3. Fiser's 1993 ERA complaint. Although Fiser had moved out of the Sequoyah Chemistry Manager position and the Corporate Chemistry Manager

¹ TVA's PG schedule includes management and specialist positions which are classified from grade PG-1 to grade PG-11.

position, TVA Nuclear's Human Resources organization had not caught up with his reassignments and had not issued official paperwork reflecting his new position. Thus, when a 1993 reorganization eliminated the Sequoyah Chemistry Manager position, Fiser still occupied the Sequoyah Chemistry Manager position on paper, and he received a reduction-in-force notice. On September 23, 1993, Fiser filed an ERA complaint alleging discrimination in his removal from the Sequoyah Chemistry Manager position. TVA management then realized that Fiser was being reduced in force from a position which he did not actually occupy. As a result, on April 5, 1994, TVA entered into a settlement agreement with Fiser canceling his RIF notice and resolving his ERA complaint by officially placing him in the lower level, nonsupervisory Chemistry Program Manager staff position at the PG-8 level in the Corporate Chemistry organization, to which he had already been assigned. As a result of the settlement, there was no decision in that case at any administrative level by the Department of Labor.

At the time of the settlement of Fiser's 1993 ERA complaint, the corporate chemistry and environmental functions were separate, with each reporting to a different manager. Although the settlement agreement provided that Fiser would be officially placed in a Chemistry Program Manager position, it did not guarantee the continued existence of that position, did not guarantee him continued employment, and did not guarantee that his position or organization would never be subject to a reorganization. Indeed, in the summer of 1994, as a result of a reorganization, a decision was made to combine the corporate Chemistry and Environmental organizations into one organization under one supervisor. By combining the two organizations, the Chemistry Manager and the Environmental Manager positions were replaced with a single Chemistry and Environmental Manager position. In addition, the Chemistry Program Manager positions and the Environmental Protection Program Manager positions were

eliminated. In their place, new Chemistry and Environmental Protection Program Manager positions were created.

Because the new positions were significantly different, the incumbents of the old Chemistry Program Manager positions were not entitled to rollover into the new positions by virtue of Federal regulations.² Accordingly, TVA posted a vacant position announcement (VPA) for the new positions and held a competitive bidding process. Fiser applied for and was a successful candidate for one of those new positions. Thus, in the fall of 1994, Fiser voluntarily left the position designated in the settlement (which was then eliminated) and entered into a new position.

4. The 1996 reorganization of corporate TVA Nuclear. As part of the workforce planning effort for the year 2001 and the budget planning process for Fiscal Year 1997, TVA Nuclear's corporate office underwent a reorganization and reduction in the summer and fall of 1996. The goal for the year 2001 was for the overall corporate organization budget to be reduced by about 40 percent. In the short term, the budget for the corporate organization was to be reduced by at least 17 percent. These proposed reductions were for TVA Nuclear as a whole; some of the constituent organizations might be more, while some might be less.

Although managers of each organization were asked to propose budget and staffing plans, the decisions on their budget and staffing were made by their superiors. Thomas McGrath, the acting General Manager of Operations Support, which included the Radiological Control and Chemistry Services organizations, requested that his subordinates propose an organization supporting the year 2001 goal,

² As a Federal agency, TVA's personnel actions are governed by regulations promulgated by the Office of Personnel Management. Under those regulations, the incumbents of positions being eliminated are entitled to "rollover" into newly created positions if the positions are sufficiently similar. When the positions are dissimilar, TVA fills vacancies on a competitive basis.

including specific functional activities, and a fiscal year 1997 budget and organization which was a logical step in achieving the 2001 goals. McGrath also requested that the Radiological Control and Chemistry Services organizations be combined under the existing but then vacant RadChem Manager position, thereby eliminating one level of management. Thus, Ron Grover, Manager of Corporate Chemistry and Environment, and Wilson McArthur, Ph.D., Manager of Corporate Radiological Control, proposed that their two staffs be combined under one manager. The organizational structure, which McGrath ultimately approved, included Grover's proposal to create two chemistry specialist, PG-8, positions, in place of the three existing generalist chemistry and environmental protection, PG-8, positions. Those positions were separate Program Manager, Boiling Water Reactor (BWR), and Pressurized Water Reactor (PWR) Chemistry positions which would enable the corporate organization to provide the sites with in-depth expertise to the plants.³ Thus, in the area of chemistry and environmental protection, the new organization eliminated one PG-11 manager and two staff positions, a PG-7 and a PG-8 position.

Fiser helped draft the job description for the new PWR Chemistry Program Manager position. Based on their evaluation of the new job descriptions, Human Resources determined that the new positions were significantly different than the old positions, and that the incumbents of the old positions did not have a right to rollover into the new positions. Accordingly, Human Resources decided to post announcements for the positions and to allow employees to apply and compete for the jobs.

When VPA No. 10703 for the PWR Chemistry Program Manager position was posted, and before any decision about who would fill those positions was

³ The idea was to have a chemistry specialist for TVA's two Boiling Water Reactors at Browns Ferry and a chemistry specialist for TVA's three Pressurized Water Reactors at Watts Bar and Sequoyah.

made, Fiser filed the complaint which ultimately gave rise to this proceeding. The thrust of this ERA complaint was that the new PWR position was the same position which he had held and also was the position guaranteed to him by virtue of the agreement settling his earlier complaint. He is clearly wrong on both counts. There is no question that TVA did place Fiser in a Chemistry Program Manager position as required by the settlement agreement. However, as discussed above, only months after being confirmed in that position, Fiser vacated the agreed-upon position when he applied on and was selected for a different position, Chemistry and Environmental Protection Program Manager. Thus, by his own actions, the position Fiser occupied when he filed his complaint was clearly not the same position set forth in the settlement agreement. Moreover, the settlement agreement made no guarantees that the position would continue in existence nor are there any guarantees of job security in the Federal employment sector.

Fiser also failed to take into account the role he played in designing the new organization. He was responsible for drafting the position description for the PWR Chemistry Program Manager position and did so with an eye to his own qualifications. At the time that he did so, he was under the impression that one of his principal competitors for the position, Sam L. Harvey, would be accepting a position to work at Sequoyah and therefore would not be applying for the corporate PWR Chemistry Program Manager position. Fiser did not object to the creation of the new position until after he learned that Harvey would not be going to Sequoyah and would be competing for the corporate PWR Chemistry Program Manager position.

The three best qualified applicants for the position, including Fiser, were interviewed by a neutral selection review board. All three candidates were asked the same questions by the review board, and their answers were scored separately by each member of the board. Fiser was scored lower than the other two applicants by each of the three review board members. Thus, based on the cumulative scores, the review

board ranked Fiser third. Based on these rankings, on July 1, 1996, McArthur, who had been made the Manager of the new organization, selected E. S. Chandrasekaran, the highest evaluated applicant, for the BWR Chemistry Program Manager position and selected Harvey, the next highest evaluated applicant, for the PWR Chemistry Program Manager position.

Although Fiser had not been selected for one of the new positions and his previous position would be eliminated effective the beginning of FY 1997, his TVA employment was not terminated. Instead, in accordance with TVA policy, Fiser was given an August 30, 1996, memorandum notifying him that he would be reassigned to TVA's Services Organization. That organization was a relatively new organization within TVA intended to allow employees whose positions had been eliminated to continue their TVA employment. The Services Organization provided job opportunities both within and outside TVA in a manner similar to a contractor. The same memorandum that notified him that he was being reassigned to the Services Organization also notified Fiser that he would continue to have a TVA job at least through the end of FY 1997, September 30, 1997. Instead of continuing his TVA employment, Fiser chose to resign effective September 6, 1996. By doing so, he qualified for a lump-sum payment equal to his salary for the entire 1997 fiscal year ending September 30, 1997, severance pay, and the cash equivalent of his annual leave balance.

Even though TVA had decided to downsize its Corporate Chemistry organization and even though Fiser was only the third-ranked candidate for the PWR Chemistry Program Manager position, TVA made an unconditional offer of that position to Fiser on September 27, 1996. However, Fiser rejected that position and took the year's salary, severance pay, and lump-sum payment for annual leave, totaling more than \$100,000.

Fiser charged that Harvey was preselected for the PWR Chemistry Program Manager position. This charge, however, is baseless. Harvey was not preselected for the position and never told Fiser that he had been. As a basis for this assertion, Fiser claimed that Harvey told him that McGrath would not release Harvey to transfer to Sequoyah. To the contrary, Harvey was unaware who made the decision not to transfer him to Sequoyah or what the basis for the decision was. Fiser further claimed that David Voeller, the Watts Bar Chemistry Manager, told him that Harvey told him that he would be working a lot closer with him in the future since he would be one of the two chemists left in corporate. Apart from the double hearsay, that statement is only a half-truth. In fact, Harvey told Voeller that he would be working with him a lot more (if he got the job) or not at all (if he did not get the job). Harvey also told Voeller that if he was not selected, he would be contacting him for employment references.

Fiser failed to mention a conversation he had with Harvey shortly after a June 17, 1996, meeting called by McGrath. In that conversation, Fiser “blew up” at Harvey, accusing him of being preselected and having been guaranteed the job. Harvey denied any preselection, and informed Fiser that he had to apply for the position just like everybody else. Fiser told Harvey that he had written the job description with himself in mind by specifying the duties which he had been performing. Fiser also said that he felt that someone was out to get him, but that “he knew how the system worked and he was going to take advantage of it.”

Fiser’s assertions that TVA posted his job and that Harvey was preselected for the position are simply speculation with no factual basis. Likewise, Fiser’s claim that McGrath was orchestrating everything just to teach him a lesson has no basis. The selection review board that recommended candidates for the PWR Chemistry Program Manager position was free of any animosity towards Fiser and that board, not McGrath or McArthur, determined that Fiser was not one of the two

top-ranked candidates. Both the 1996 reorganization and the decision not to select Fiser were free from any discriminatory animus toward Fiser.

It is TVA's position that the NRC staff cannot establish a prima facie case of discrimination since it cannot demonstrate a nexus between Fiser's claimed protected activity and any alleged adverse action. Second, even if the NRC staff could establish a prima facie case, it cannot meet its burden of proving that TVA's reasons for its 1996 reorganization or Fiser's nonselection for one of the newly created positions were a pretext for discrimination.

Issues to be Litigated

The issues in this proceeding are as stated by the Licensing Board in its Memorandum and Order of June 28, 2001: (a) whether TVA violated the NRC's employee protection requirements as set forth on the staff's Notice of Violation and Proposed Imposition of Civil Penalty, dated February 7, 2000; and, if so (b) whether the Order Imposing the Civil Penalty should be sustained. From TVA's perspective, important issues necessary to reach the overall questions are:

1. What is the standard of proof applicable to an enforcement proceeding in which a licensee is alleged to have violated NRC's employee-protection requirements set forth in 10 C.F.R. § 50.7?
2. Can the NRC staff prove by a preponderance of the evidence the existence of a causal nexus between Fiser's claimed protected activity and any alleged adverse action (*i.e.*, whether the TVA Nuclear reorganization and Fiser's nonselection in 1996 were taken because of his claimed protected activity)?
3. Whether intent to retaliate is a required element of the necessary causal nexus between protected activity and adverse action, and, if so, whether there was any intent to retaliate against Fiser for engaging in protected activity on the part of

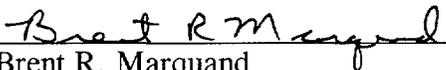
the two individuals cited by the NRC staff as responsible for the violation issued to TVA?

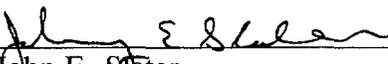
4. Even if the NRC staff could establish a prima facie case, can it prove by a preponderance of the evidence that TVA's reasons for its 1996 reorganization and Fiser's nonselection for one of the newly created positions were a pretext for discrimination?

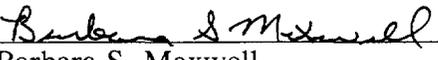
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing prehearing statement of facts and issues to be litigated, reply to notice of violation, and supplemental reply to notice of violation have been served on the following by mailing copies to all and by electronic mail as indicated by an asterisk (*).

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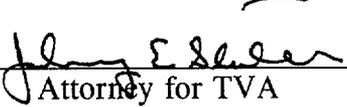
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This 16th day of July, 2001.



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