



UNITED STATES
NUCLEAR REGULATORY COMMISSION
REGION II
SAM NUNN ATLANTA FEDERAL CENTER
61 FORSYTH STREET, SW, SUITE 23T85
ATLANTA, GEORGIA 30303-8931

February 7, 2000

EA 99-234

Tennessee Valley Authority
ATTN: Mr. J. A. Scalice
Chief Nuclear Officer and
Executive Vice President
6A Lookout Place
1101 Market Street
Chattanooga, TN 37402-2801

SUBJECT: NOTICE OF VIOLATION AND PROPOSED IMPOSITION OF CIVIL
PENALTY - \$110,000 (NUCLEAR REGULATORY COMMISSION'S OFFICE OF
INVESTIGATIONS REPORT NO. 2-98-013)

Dear Mr. Scalice:

This letter refers to the investigation initiated by the Nuclear Regulatory Commission's (NRC) Office of Investigations (OI) on April 29, 1998, and completed on August 4, 1999. Based on the findings of the investigation, an apparent violation was identified involving discrimination by Tennessee Valley Authority (TVA) against Mr. Gary L. Fiser, a former corporate employee, for engaging in protected activities. The synopsis of the OI report and report summary were provided to TVA by letter dated September 20, 1999. A closed, predecisional enforcement conference was conducted at the NRC Region II office in Atlanta, Georgia, on December 10, 1999, to discuss the apparent violation. At NRC's request, TVA submitted supplemental information by letters dated December 15 and 20, 1999. A list of conference attendees, and copies of the NRC's presentation material, TVA's presentation material and supplemental correspondence (excluding the December 20, 1999 personnel related information), and information presented by Mr. Fiser at the conference are enclosed.

After a review of the information obtained during and subsequent to the predecisional enforcement conference and the information developed during the OI investigation, the NRC has determined that a violation of NRC requirements occurred. The violation is cited in the enclosed Notice of Violation and Proposed Imposition of Civil Penalty (Notice), and the circumstances surrounding it are described in detail in the previously provided summary of the OI investigation report.

The violation involves employment discrimination in contravention of the Commission's requirements in 10 CFR 50.7, Employee Protection, in that TVA caused the non-selection of Mr. Fiser to a competitive position in 1996, due, at least in part, to his engagement in protected activity. Specifically, in 1993, Mr. Fiser filed a discrimination complaint with the Department of Labor (DOL), in which he alleged that TVA discriminated against him, in part, for raising nuclear safety concerns related to his activities as Chemistry and Environmental Superintendent at the Sequoyah Nuclear Power Plant. The nature of the nuclear safety concerns included his

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identification of various chemistry related issues at the Sequoyah facility in the 1991 to 1993 time frame. Individuals who were knowledgeable of Mr. Fiser's 1993 DOL complaint and/or the chemistry related safety concerns at that time included the Nuclear Safety Review Board (NSRB) Chairman and an NSRB committee member. As part of their NSRB responsibilities, these two individuals were critical of the existence and timely resolution of chemistry related issues in Mr. Fiser's department, and were outspoken in their dissatisfaction with Mr. Fiser's ability to implement effective corrective action.

After the 1993 DOL complaint was settled and Mr. Fiser was reinstated to a position in TVA, a corporate reorganization occurred in mid-1994, and Mr. Fiser was selected to the position of Chemistry and Environmental Protection Program Manager within the Operations Support corporate organization. Subsequent to his selection to this position, in approximately early to mid 1996, the individuals who served as NSRB Chairman and NSRB committee member (in 1993) were placed in the corporate positions of General Manager, Operations Support, and Radcon Chemistry Manager, respectively. These positions represented Mr. Fiser's first and second level management superiors. Thereafter, in July 1996, the Operations Support group was again reorganized. As part of this reorganization, the three Chemistry and Environmental Protection Program Manager positions, one of which Mr. Fiser held, were eliminated, and two new Chemistry Program Manager positions were created and competitively posted.

At that time, Mr. Fiser informed TVA of his intent to file a DOL complaint should TVA decide to competitively post these positions. In June 1996, Mr. Fiser filed a DOL complaint which was based on his belief that posting these positions constituted discrimination for his engagement in previous protected activity. Mr. Fiser believed that his previous position description and experience warranted his transfer into one of the two newly created positions. Subsequently, Mr. Fiser applied for one of the two new positions, but was not selected. The NRC concluded that Mr. Fiser's engagement in the protected activities outlined above was a factor in his eventual non-selection to the position for which he applied.

At the conference, TVA representatives indicated that the 1996 reorganization which resulted in the elimination of Mr. Fiser's Chemistry and Environmental Protection Program Manager position was implemented for legitimate business reasons. TVA representatives also stated that the decision to competitively post these and other positions, while filling other positions without competitively posting, was based on TVA's understanding of applicable law. In addition, TVA representatives presented information indicating that the selection process for the newly posted positions of Chemistry Program Manager was as impartial as possible, and in accordance with TVA policies and procedures. TVA also stated that the former NSRB Chairman was unaware of Mr. Fiser's 1993 DOL complaint until June of 1996, and that the individuals involved in the selection process were unbiased with respect to Mr. Fiser's DOL activities. TVA took exception to the statements in the NRC's September 20, 1999, letter, that the 1993 NSRB Chairman and Committee Member were named as culpable parties in Mr. Fiser's 1993 DOL complaint.

The NRC recognizes that licensees may implement reorganizations for legitimate business reasons, which may result in adverse personnel actions against its employees. However, the NRC does not agree with TVA that the actions which ultimately resulted in Mr. Fiser's non-selection to the Chemistry Program Manager position were based solely on non-discriminatory,

business reasons. The NRC agrees with TVA that the former NSRB Chairman and committee member were not named as culpable parties in Mr. Fiser's 1993 DOL complaint, as misstated in our September 20, 1999 letter. However, the NRC notes that these individuals were knowledgeable and critical of Mr. Fiser's 1991-1993 protected activity involving chemistry related safety concerns and their actions in this regard were part of the information developed associated with the 1993 DOL case. Moreover, given his position in the organization and the number of TVA employees who were involved in the various DOL and TVA Inspector General interviews, the NRC also considers it more likely than not that the former NSRB Chairman was aware that Mr. Fiser filed a 1993 DOL complaint prior to 1996.

Shortly after these two individuals were named as General Manager, Operations Support, and Radcon Chemistry Manager, in 1996 (Mr. Fiser's first and second level management superiors), a reorganization was implemented at the direction of the General Manager of Operations Support that ultimately resulted in the elimination of one of the Chemistry and Environmental Manager positions and the non-selection of Mr. Fiser to the newly created Chemistry Program Manager positions. The temporal proximity between the appointment of these two individuals as Mr. Fiser's supervisors and his non-selection in July 1996, and the disparate treatment of Mr. Fiser with respect to the new Chemistry Program Manager position led the NRC to conclude that the reasons for Mr. Fiser's non-selection, as articulated by TVA at the conference, were pretextual. As to the disparate treatment issue, TVA's rationale for posting the Chemistry Program Manager position and requiring Mr. Fiser to compete for the job, while filling the Radcon Chemistry Manager position without posting it in 1996, were inconsistent. In both cases, the individuals had previously performed the functions of the new positions they were seeking, yet in the case of Mr. Fiser, he was not permitted to fill the position noncompetitively as had the Radcon Chemistry Manager. Moreover, TVA's explanations with respect to the decision making process for the filling of the Radcon Chemistry Manager position changed over time.

The NRC also considered it likely that an individual was pre-selected to one of the Chemistry Program Manager positions. In addition, at least two of the three individuals on the selection review board, and the selecting official, had knowledge of Mr. Fiser's 1993 DOL complaint. Of particular relevance to the NRC is the fact that certain selection review board members discussed the existence of Mr. Fiser's prior protected activity just prior to conducting interviews for the position of Chemistry Program Manager. This conduct casts further doubt on the impartiality of the selection process. Based on these and other reasons, the NRC has concluded that discrimination was at least a factor in Mr. Fiser's non-selection.

Therefore, the NRC has concluded that the actions taken against the former corporate employee were due in part to his participation in activities protected by 10 CFR 50.7. Since the adverse employment action was taken by individuals the NRC considers to be mid-level management officials, this violation has been categorized in accordance with the "General Statement of Policy and Procedures for NRC Enforcement Actions" (Enforcement Policy), NUREG-1600, at Severity Level II.

In accordance with the Enforcement Policy, a base civil penalty in the amount of \$88,000 is considered for a Severity Level II violation. Because this violation is characterized at Severity Level II, the NRC considered whether credit was warranted for Identification and Corrective

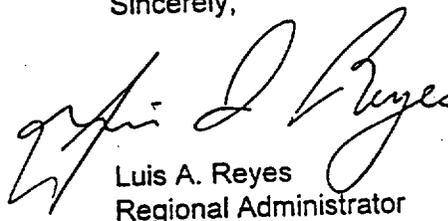
Action in accordance with the civil penalty assessment process described in Section VI.B.2 of the Enforcement Policy. No credit was determined to be warranted for Identification, because this violation was identified by the NRC. Corrective actions presented by TVA at the conference included various employee training on building and maintaining a safety conscious work environment, and issuance of an employee bulletin reinforcing TVA's policy against discrimination. However, in that you denied the occurrence of a violation, to date you have not taken any specific corrective actions to address the root and contributing causes, nor taken actions to prevent recurrence, resulting in no credit for the factor of Corrective Action.

Therefore, to emphasize the importance of a safety conscious work environment that is free of discriminatory employment actions and the need for prompt identification and comprehensive correction of violations, I have been authorized, after consultation with the Director, Office of Enforcement, and the Deputy Executive Director for Reactor Programs, to issue the enclosed Notice. In this case, because credit was not warranted for the factors of Identification and Corrective Action, the NRC normally would propose a civil penalty at twice the base civil penalty of \$88,000. However, in accordance with the Enforcement Policy, I have been authorized to assess a civil penalty at the maximum daily amount for a single violation of \$110,000 for this Severity Level II violation.

You are required to respond to this letter and should follow the instructions specified in the enclosed Notice when preparing your response. The NRC will use your response, in part, to determine whether further enforcement action is necessary to ensure compliance with regulatory requirements.

In accordance with 10 CFR 2.790 of the NRC's "Rules of Practice," a copy of this letter, its enclosures, and your response will be placed in the NRC Public Document Room.

Sincerely,



Luis A. Reyes
Regional Administrator

Docket Nos. 50-390, 50-327, 50-328,
50-269, 50-260, 50-296
License Nos. NPF-90, DPR-77, DPR-79,
DPR-33, DPR-52, DPR-68

Enclosures and cc: See Page 5