

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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)	50-260-CivP; 50-296-CivP
)	
)	ASLBP No. 01-791-01-CivP
)	
)	EA 99-234

NRC STAFF RESPONSE TO TENNESSEE VALLEY AUTHORITY'S
SECOND SET OF INTERROGATORIES

INTRODUCTION

Pursuant to 10 C.F.R. § 2.740b(b), the Nuclear Regulatory Commission (NRC) Staff (Staff) hereby provides the following responses and objections to Tennessee Valley Authority's (TVA) Second Set of Interrogatories.

INTERROGATORY 1

Page 1 of the February 7, 2000, letter to TVA which enclosed the notice of violation (NOV) which is the subject of this proceeding, states that "TVA caused the non-selection of Mr. Fiser." Please give a detailed factual explanation of how the Staff contends that TVA cause him to be nonselected.

RESPONSE

TVA caused Fiser to be nonselected for the position of PWR Chemistry Program Manager by engaging in the following behavior: blocking the transfer of Sam Harvey to Sequoyah; determining that the new Chemistry Program Manager position should be posted rather than having incumbents rollover into the new positions; naming Wilson McArthur the Radiological Control and

Chemistry Manager without posting the position, thereby making McArthur the selecting official for the PWR Chemistry Program Manager position; permitting McArthur, who was involved in both Fiser's 1993 and 1996 Department of Labor (DOL) complaints, to serve as the selecting official; setting up a selection review board in which two of the three members had knowledge of or involvement in Fiser's DOL activities; permitting the interviews to continue despite a statement by one of the board members about Fiser's DOL activities prior to the interviews; failure to reschedule the interviews when Jack Cox was unable to attend the selection review board; writing and asking interview questions designed to highlight secondary chemistry over primary chemistry; and failure to follow TVA selection policy as set forth in BP 102.

INTERROGATORY 2

Page 1 of the February 7, 2000, letter states that "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." Identify with specificity each and every nuclear safety concern which was identified in the 1993 complaint as having been raised by Fiser. With respect to each such concern, state whether Thomas J. McGrath and/or Wilson C. McArthur were aware of such concern, whether each of them thought that Fiser had raised the concern, and identify the evidence that shows how and when they gained such awareness.

RESPONSE

The Staff has previously provided this information in the September 4, 2001 "NRC Staff Response to Tennessee Valley Authority's First Set of Interrogatories," response to Interrogatories 1 and 2, and in the September 14, 2001 letter to Barbara Maxwell providing supplemental responses to those interrogatories. The Staff further supplements those responses by providing the following additional information. Fiser's September 23, 1993 Department of Labor complaint sets forth a number of nuclear safety concerns he raised and/or resolved, including: a Significant Corrective Action Report (SCAR) delineating a problem with radmonitor effluent calculations and corrective actions to bring the monitor into compliance; a SCAR involving a containment radiation

monitor that had been improperly aligned; and a dispute with Site Vice President Jack Wilson involving the three hour requirement for conducting post accident sampling analyses. For further detail on these protected activities, see the 1993 Complaint and the Fiser deposition, December 11-12, 2001.

INTERROGATORY 3

The summary of Office of Investigations (OI) Report 2-98-013 (hereafter referred to as "report summary") states that the "evidence indicated that the selection process was contrived to preclude the selection of the employee [referring to Fiser]." Identify in detail (a) the evidence gathered in the OI investigation and (b) the evidence which the Staff contends indicates that the selection of Fiser was "preclude[d]." Give a detailed factual explanation of all of the evidence you contend supports the statement that the process was "contrived."

RESPONSE

(a) The evidence gathered in the OI investigation includes all of the interviews conducted by OI and the other documents included as exhibits to the OI Report. Specifically, the interview statements by Fiser, Grover, Kent, Easley, Boyles, Corey, McArthur and McGrath provide such evidence.

(b) See Staff Response to Interrogatory 1.

INTERROGATORY 4

The report summary states that "the evidence revealed that . . . this same individual [referring to Sam Harvey] could have been placed in a vacant site chemistry position." Identify in detail (a) the evidence gathered in the OI investigation and (b) the evidence which the Staff contends reveals that there was an existing vacancy at the appropriate grade at the site and how that individual could have been placed in such a position consistent with TVA Nuclear's selection process.

RESPONSE

(a) The evidence gathered in the OI investigation includes all of the interviews conducted by OI and the other documents included as exhibits to the OI Report. Specifically, the interview statements by Kent, Easley, Boyles, McArthur and McGrath provide such evidence.

(b) The Staff has previously provided this information in the September 4, 2001 "NRC Staff Response to Tennessee Valley Authority's First Set of Interrogatories," response to Interrogatory 25. In addition, Kent has stated that there was a chemistry position at Sequoyah that had been vacated by Bruce Fender. The Staff makes no contentions about how Harvey could have been placed in such a position consistent with TVA Nuclear's selection process because, based on the depositions provided by TVA managers, the only process employed at TVA is to take whatever action achieves the desired outcome in a given case and because TVA has not provided the Staff with a consistent explanation of how its selection process works.

INTERROGATORY 5

The report summary states that "the evidence revealed that the request for placement of this individual at the site was rejected by the Manager, Operations Support." Identify in detail (a) the evidence gathered in the OI investigation and (b) the evidence which the Staff contends reveals how such a placement could have been accomplished consistent with TVA's application of the Office of Personnel Management (OPM) regulations on transfer of functions.

RESPONSE

(a) The Staff has previously provided this information in the September 4, 2001 "NRC Staff Response to Tennessee Valley Authority's First Set of Interrogatories," response to Interrogatory 24.

(b) The Staff makes no contentions about how such placement could have been accomplished consistent with TVA's application of the OPM regulations on transfers of functions because Keith Fogleman, TVA's designated expert on personnel matters, was unable to provide

any explanation of how TVA applies OPM regulations during his deposition. Additionally, the Staff contends that OPM regulations regarding transfer of functions are not applicable here because the placement of Harvey at Sequoyah involved filling a vacant position, and not a transfer of functions.

INTERROGATORY 6

Does the Staff contend that the reason Mr. McGrath and Human Resources did not transfer Sam Harvey to the site is not a legitimate nondiscriminatory business reason? If you contend that the decision was motivated by discrimination, give a detailed explanation of the evidence which you contend supports your contention.

RESPONSE

The Staff contends that McGrath blocked the transfer of Harvey to Sequoyah because he preselected Harvey for one of the two remaining Corporate Chemistry positions and to ensure the removal of Fiser from TVA. The Staff contends that the “legitimate nondiscriminatory business reason” alleged by TVA is a pretext for discrimination against Fiser. For an explanation of the evidence which demonstrates a retaliatory animus on the part of McGrath toward Fiser, see the September 4, 2001 “NRC Staff Response to Tennessee Valley Authority’s First Set of Interrogatories,” response to Interrogatory 7.

INTERROGATORY 7

The February 7, 2000 letter states on page 2 that “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 [referring to Mr. McGrath and Dr. McArthur, respectively].”

(a) Do you contend that Mr. McGrath was aware of Fiser’s 1993 DOL complaint prior to June 1996? If so, identify in detail all of the evidence that supports your contention.

(b) Identify the specific “chemistry related safety concerns” of which Mr. McGrath and Dr. McArthur were aware. For each specific concern, state whether you contend it was activity by Fiser protected by 10 C.F.R. § 50.7 or 42 U.S.C. § 5851. If you contend that a specific concern was protected activity by Fiser, identify the evidence that shows how and when Mr. McGrath and Dr. McArthur became aware of his engagement in such activity.

(c) Do you contend that Fiser identified the existence of “chemistry related safety concerns” at the site? With respect to each concern you contend he identified, identify the evidence which

shows how and when he identified such concerns. With respect to each concern he did not identify, state whether you contend that such concern constituted protected activity on the part of Fiser. If so, explain the detailed factual basis for your contention.

RESPONSE

(a) The Staff contends that McGrath was aware of Fiser's protected activities prior to June 1996. See the September 4, 2001 "NRC Staff Response to Tennessee Valley Authority's First Set of Interrogatories," response to Interrogatory 1.

(b) See the September 4, 2001 "NRC Staff Response to Tennessee Valley Authority's First Set of Interrogatories," response to Interrogatories 1 and 2.

(c) The Staff contends that Fiser identified the existence of the chemistry related concerns identified in the September 4, 2001 "NRC Staff Response to Tennessee Valley Authority's First Set of Interrogatories," response to Interrogatories 1 and 2. For further detail on when and how he identified these concerns, see the Fiser deposition, December 11-12, 2001.

INTERROGATORY 8

Page 2 of the February 7, 2000, letter states that "these two individuals [referring to Mr. McGrath and Dr. McArthur] were critical of the existence and timely resolution of chemistry related issues in Fiser's department, and were outspoken in their dissatisfaction with Mr. Fiser's ability to implement effective corrective action."

(a) Identify all of the evidence that supports the statement that Mr. McGrath and Dr. McArthur were "critical of . . . Mr. Fiser's ability."

(b) Do you contend that the perception that Fiser lacked the "ability to implement effective corrective action" was not a legitimate business concern? If you do not agree that such perception was a nondiscriminatory reason for concern, state the detailed factual basis for your contention.

(c) Do you contend that management did not in fact perceive that Fiser lacked the ability to implement effective corrective action? If so, identify all of the evidence supporting your contention.

(d) Do you contend that Fiser's failure to "implement effective corrective action" was protected activity? If so, state the detailed factual basis for your contention.

(e) Do you contend that the existence of longstanding chemistry related issues in the site chemistry department was not a legitimate nondiscriminatory reason for management concern? If you do not agree that the longstanding existence of such issues was a nondiscriminatory reason for management concern, state the detailed factual basis for your contention.

(f) Do you contend that the timely resolution of chemistry related issues in the site chemistry department was not a legitimate nondiscriminatory reason for management concern? If you do

not agree that the timely resolution of such issues was a nondiscriminatory reason for management concern, state the detailed factual basis for your contention.

RESPONSE

(a) See the September 4, 2001 “NRC Staff Response to Tennessee Valley Authority’s First Set of Interrogatories,” response to Interrogatories 1 and 2.

(b) The Staff makes no contention regarding whether there was or was not a perception that Fiser lacked the “ability to implement corrective action” or that there was or was not a legitimate business reason for management concern.

(c) The Staff makes no contention regarding whether management did or did not perceive that Fiser lacked the ability to implement effective corrective action.

(d) The Staff identified the protected activity in which Fiser engaged in the September 4, 2001 “NRC Staff Response to Tennessee Valley Authority’s First Set of Interrogatories,” response to Interrogatories 1 and 2. The Staff has further supplemented those responses in its response to Interrogatory 2 of these interrogatories.

(e) The Staff makes no contention regarding whether the existence of longstanding chemistry related issues in the site chemistry department was or was not a legitimate business reason for management concern.

(f) The Staff makes no contention regarding whether the timely resolution of chemistry related issues in the site chemistry department was or was not a legitimate nondiscriminatory reason for management concern.

INTERROGATORY 9

Page 3 of the February 7, 2000, letter states that “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 [referring to Mr. McGrath] was aware that Mr. Fiser filed a 1993 DOL complaint *prior to 1996* [emphasis added].” The Staff’s response to interrogatory No. 4 of TVA’s first set of interrogatories states in

part that “the number of TVA employees who were involved in the various DOL and inspector General interviews . . .,” and this statement refers to Fiser’s 1996 complaint.

(a) Give a detailed factual explanation of why you contend the statement “refers to Fiser’s 1996 DOL complaint” since the letter states that the number of TVA employees who were involved in . . . interviews” was the basis for concluding that McGrath was likely aware of Fiser’s 1993 DOL complaint “*prior to 1996.*”

(b) If you no longer contend that the statement “refers to Fiser’s 1996 DOL complaint,” identify all of the persons interviewed by DOL as part of the proceedings instituted as a result of Fiser’s 1993 complaint.

(c) Do you contend that Mr. McGrath was informed of any of the interviews conducted by TVA’s Inspector General in connection with Fiser’s 1993 DOL complaint? If so, identify the evidence showing how, when, and by whom he was informed.

(d) Do you contend that any of the persons interviewed by TVA’s Inspector General in connection with Fiser’s 1993 complaint were supervised by or had a reporting relationship to Mr. McGrath? If so, identify each and every such person and state their organizational relationship to him.

RESPONSE

(a) The basis for concluding that it was more likely than not that McGrath was aware of the 1993 complaint prior to 1996 was because of his position in the organization and the number of TVA employees involved in the investigation and resolution of the 1993 complaint, as well as the publicity and Congressional involvement in the issues raised by the complaint.

(b) The Staff lacks knowledge of what individuals, if any, may have been interviewed by DOL as part of the proceedings instituted as a result of Fiser’s 1993 complaint.

(c) The Staff makes no contention as to whether or not McGrath was informed of any of the interviews conducted by TVA’s Inspector General in connection with Fiser’s 1993 DOL complaint.

(d) The Staff makes no contention as to whether or not any of the persons interviewed by TVA’s Inspector General in connection with Fiser’s 1993 DOL complaint were supervised by or had a reporting relationship to Mr. McGrath because the Staff lacks knowledge of each individual McGrath has supervised in his various positions during his tenure at TVA.

INTERROGATORY 10

Page 3 of the February 7, 2000, letter states that the “temporal proximity between the appointment of those two individuals [referring to Mr. McGrath and Dr. McArthur] as Mr. Fiser’s supervisors and his nonselection 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 nonselection, as articulated by TVA at the conference, were pretextual.”

(a) Does the Staff contend that the reasons given by TVA for Fiser’s nonselection were pretextual based on the temporal proximity between Mr. McGrath’s and Dr. McArthur’s appointment as Mr. Fiser’s supervisors and the reorganization and Fiser’s nonselection? If so, give a detailed explanation for your contention.

(b) State the number of months and days from the last date that Fiser engaged in protected activity which the Staff contends motivated the adverse employment actions to the date of those adverse actions. Specifically, identify the adverse employment action, the protected activity, and the dates on which each occurred.

RESPONSE

(a) One of the reasons the Staff contends that the reasons given by TVA for Fiser’s nonselection were pretextual is the temporal proximity between McGrath and McArthur’s appointment as Fiser’s supervisors and the reorganization and Fiser’s nonselection. Less than two months after McArthur became Fiser’s first line supervisor, Fiser was not selected for one of the Chemistry Program Manager positions.

(b) Fiser’s most recent protected activity was the filing of his 1996 DOL complaint on June 25, 1996. Prior to that, the most recent protected activity was the filing of his 1993 DOL complaint on September 23, 1993. McGrath took over as Acting General Manager of Operations Support sometime in the fall of 1995. McArthur was announced as the new RadChem Manager on June 17, 1996. The interviews for the new Chemistry Program Manager position were held on July 18, 1996 and McArthur made the decision not to select Fiser for that position on July 31, 1996.

INTERROGATORY 11

Page 3 of the February 7, 2000, letter states that “[o]f particular relevance to the NRC is the fact that certain selection review board members discussed the existence of 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.”

- (a) Identify in detail what you contend was said.
- (b) Identify the persons the Staff contends were participants to the discussion and what each participant heard.
- (c) Do you contend that any of the members of the selection review board became aware of Fiser's DOL complaint as a result of the discussion. If so, identify the board member.
- (d) Do you contend that the discussion reflected any animosity regarding Fiser's protected activity?
- (e) Do you contend that the discussion was a cause of Fiser's nonselection?
- (f) Do you contend that the discussion affected Fiser's scores on any of the questions by the selection review board? If so identify which scores were affected and by which board member?
- (g) Given the sworn testimony by the various board members about the discussion, give a detailed explanation of how that discussion "casts doubt on the impartiality of the selection process."
- (h) Does the Staff have any evidence that the discussion happened in any way other than as described in the sworn testimony of the various board members? If so, give a detailed description of such evidence.

RESPONSE

(a) The Staff contends that Charles Kent stated that Fiser had filed a DOL complaint and that he told McArthur that he should not participate in the Selection Review Board because of Fiser's complaint.

(b) The participants in the conversation were Kent and McArthur. John Corey was also present for the conversation and heard Kent mention Fiser's DOL activities. The Staff lacks knowledge as to whether there were any other participants or individuals who heard this conversation.

(c) The Staff contends that Corey became aware of the 1996 DOL complaint as a result of this discussion.

(d) The Staff contends that the discussion reflected inappropriate behavior that worked to Fiser's detriment.

(e) The Staff contends that the discussion was a violation of section 211 of the Energy Reorganization Act.

(f) The Staff makes no contention as to whether or not the discussion affected Fiser's scores on any of the questions by the selection review board.

(g) The Staff contends that the discussion casts doubt on the impartiality of the selection process because TVA has repeatedly argued that it took numerous precautions after Fiser filed his DOL complaint to ensure that the selection process was fair. However, TVA permitted McArthur to serve as the selecting official, despite his being involved in the 1993 complaint and identified as a discriminating party in the 1996 complaint. In addition, McGrath and other TVA employees stated that they wanted to ensure that no one who was involved with the 1993 complaint was involved in the selection process, yet they permitted Kent, who had been interviewed for the 1993 complaint, to serve on the selection review board. Also, McArthur and McGrath stated that, if Jack Cox had been available to serve on the review board, they may have had to exclude him based on statements he made in favor of Fiser. However, neither McArthur, McGrath, nor Human Resources considered that Kent's attempt to have Harvey transferred to Sequoyah demonstrated a bias in favor of Harvey. McArthur also reported Cox's statement in favor of Fiser and raised the concern about potential bias, yet McArthur did not inform anyone of the discussion with Kent before the interviews. This discussion should have been of great concern to McArthur if he was as concerned about having an impartial selection process as he has proclaimed himself to be. If TVA was as concerned about the impartiality of the selection process as it claims to have been, then this discussion by Kent should have immediately been brought to the attention of Human Resources for a determination of its effect on the selection process.

(h) The Staff's evidence comes from statements by McArthur, Kent, and Corey, including TVA OIG interviews, DOL interviews, NRC OI interviews, Predecisional Enforcement Conference statements, and the depositions taken during discovery.

INTERROGATORY 12

Do you contend that TVA's decision to post the Chemistry Program Manager was incorrect? If so, give a detailed factual basis for your contention.

RESPONSE

The Staff contends that the explanations that TVA provided for its decision to post the Chemistry Program Manager positions are inadequate to defend its argument that the position should be posted. TVA employees have provided two arguments for why this position should have been posted. First, TVA employees stated that the two Chemistry Program Manager positions should have been posted because there were three incumbents and each of them should have the opportunity to compete for a position. Under the selection policy TVA provided to the Staff during discovery, this should not have been a consideration in making the determination to post the positions for competition. Second, TVA employees stated that the positions had to be posted because a comparison of the new position with the Chemistry and Environmental Protection Program Manager positions demonstrated that the jobs were significantly different. However, testimony from TVA employees indicated that the removal of the environmental duties from the position descriptions did not result in a significant change in the duties.

INTERROGATORY 13

Page 3 of the February 7, 2000. letter states that “[I]n both cases, the individuals had previously performed the functions of the new positions they were seeking”

(a) Do you contend that TVA employees have the right to roll back to positions they previously performed regardless of whether they have been officially selected for intervening positions? If so, state the detailed basis for your contention.

(b) Do you contend that Dr. McArthur was not entitled to be placed in the position of Corporate RadChem Manager in accordance with TVA’s application of its process and its application of OPM regulations? If so, state why you contend he was placed in that position. Also, please state why you contend he was not entitled to the position.

RESPONSE

(a) The Staff makes no contention as to whether or not TVA employees have the right to roll back to positions they previously performed regardless of whether they have been officially selected for intervening positions.

(b) The Staff contends that TVA's placement of McArthur in the Corporate RadChem Manager position was not in accordance with TVA's application of its process and its application of OPM regulations. First, TVA has provided conflicting reasons for why McArthur was placed in that position without posting it for competition. See the September 4, 2001 "NRC Staff Response to Tennessee Valley Authority's First Set of Interrogatories," response to Interrogatory 15. Second, the Personnel Manual Instruction provided to the Staff by TVA during discovery states that such determinations must be made based on the content of "*accurate, up-to-date job descriptions* [emphasis added]." TVA has represented that, in making its determination that McArthur could be placed into the position without competition, it compared the RadChem Manager position description with McArthur's 1990 position description for Manager of Technical Programs. Since McArthur had been selected as the Manager of Radiological Controls in 1994, the comparison done by TVA Human Resources knowingly used an inaccurate and out-of-date position description in making its determination. McArthur was not entitled to that position because he was no longer the Manager of Technical Programs and that position description should not have been used for the determination on posting. In addition, the April 14, 1994 revised selection and waiver policy stated that "all management schedule positions PG-1 through senior manager will be advertised TVA wide with only a few exceptions [emphasis in original]." The exceptions were established as a result of the Wes Motley case and generally provide for a waiver from posting in order to hire minorities and women. The Staff contends that this policy would have permitted placing Grover in the RadChem Manager position without posting, but would not permit placing McArthur in that position without posting. The Staff contends that McArthur was placed in that position because McGrath wanted him to serve as the RadChem Manager and because if the position had been posted, the waiver policy available for minority hiring could have been used to place Ron Grover in that position. Grover testified that he would have selected Fiser for one of the Chemistry Manager positions.

INTERROGATORY 14

Page 1 of the NOV states that “the Tennessee Valley Authority (TVA) discriminated against Mr. Gary L. Fiser, a former corporate employee, for engaging in protected activities. Specifically, in July 1996, TVA eliminated Mr. Fiser’s position of chemistry and Environmental Protection Program Manager, Operations Support, as part of a reorganization, and took subsequent actions to ensure that he was not selected for one of two new positions within Operations Support.”

(a) Do you contend that the reorganization was undertaken “in retaliation” for Fiser’s protected activities?

(b) Do you contend that the elimination of Fiser’s position was undertaken “in retaliation” for Fiser’s protected activities?

(c) If your answers to each of the above subparts is not an unqualified no, give a detailed factual explanation for your contention.

(d) Identify each of the “subsequent actions” which you contend were taken to “ensure” that Fiser was “not selected.”

RESPONSE

(a) The Staff does not contend that the decision to reorganize the corporate offices of TVA Nuclear was made in retaliation for Fiser’s protected activities.

(b) The Staff contends that the elimination of Fiser’s position was undertaken “in retaliation” for Fiser’s protected activities. The reorganization for FY 1997 called for cuts of approximately 17 percent of the budget, with reductions of 40 percent over the next five years. The Corporate Chemistry organization could have been reduced by 17 percent for FY 1997 without eliminating positions, as proposed by Ron Grover. McGrath and McArthur rejected this suggestion, which would have ensured that Fiser remained employed with TVA, and instead determined that the three Corporate Chemistry positions should be cut to two positions.

(c) See above responses.

(d) See Staff Response to Interrogatory 1.

INTERROGATORY 15

Page 2 of the May 4, 2001, letter to TVA states that “[c]ertain TVA managers were aware of his protected activity when the selection process, designed by these same managers, failed to select him for one of the two new positions.”

Do you contend that the participation by managers who had an awareness of Fiser's protected activity was (a) inappropriate, (b) discrimination, (c) a violation of NRC regulations, or (d) inconsistent with TVA processes? If so, give a detailed factual explanation of each such contention.

RESPONSE

The participation of managers who had an awareness of and involvement in Fiser's protected activities was inappropriate, contributed to retaliatory action against Fiser, and resulted in a violation of 10 C.F.R. 50.7 by TVA. For additional response, see Staff Response to Interrogatory 11. The Staff makes no contention as to whether or not participation by these managers was inconsistent with TVA processes because it has no knowledge of whether TVA processes include a policy on such matters.

INTERROGATORY 16

Page 2 of the May 4, 2001, letter to TVA states that "[the selection process for the newly created Chemistry Program Manager positions in Operations Support was not in accordance with TVA's normal process." Give a detailed factual explanation how you contend that the process was not in accordance with TVA's normal process.

RESPONSE

The process was not in accordance with the TVA selection process policies provided to the Staff by TVA. Page 2 of BP 102, dated September 30, 1993, requires selecting managers to make decisions on vacant positions

based on information contained in the personal history record; interview/assessment results; a thorough review of the qualifications of the candidates as compared with the requirements of the position; input from upper-level management involved in the process; information obtained from references; and affirmative employment consideration.

According to McArthur, he made his selections for the Chemistry Program Manager positions based solely on the interview results, without a thorough review of qualifications or the personal

history records. There is also no evidence that he sought information from references. For additional response, see Staff Response to Interrogatory 12.

INTERROGATORY 17

The report summary states that “the individual appointed to the position of Racon Chemistry Manager (a position created in mid-1996) was transferred to this position without competition in contravention of TVA policy”

(a) Give a detailed factual explanation of how you contend this action was “in contravention of TVA policy.”

(b) Identify all witnesses and facts which you believe support this contention.

RESPONSE

(a) and (b) See Staff Response to Interrogatory 13(b).

INTERROGATORY 18

Identify each individual with knowledge or information on which the NRC staff will rely in this case, particularly noting those individuals the NRC staff intends to call as witnesses at the hearing before the Board.

RESPONSE

The Staff will rely upon information and knowledge provided by each of the individuals who it deposed during discovery, Gary Fiser, and Ronald Grover. Additionally, the Staff intends to rely upon information and knowledge contained in OI Interviews, DOL Interview statements, TVA OIG Records of Interview, and statements made at the NRC Predecisional Enforcement Conferences. The Staff has not yet drafted its witness list for the hearing before the Board.

INTERROGATORY 19

Identify the legal standard which you believe applies to actions under 10 C.F.R. § 50.7 (2001). Specifically, state the legal standard the NRC applies to result in a finding of discrimination. Identify all documents in the custody of the NRC, including the Office of the General Counsel, or

elsewhere which discuss or analyze the legal standard being applied, or which may have been applied in the past, in making a determination under 10 C.F.R. § 50.7.

RESPONSE

The Staff objects to this interrogatory on the ground that it calls for a legal conclusion that constitutes attorney work product. Inquiries into issues of “pure law” are not permissible interrogatories. See Abbott v. United States, 177 FRAT 92 (N.D.N.Y. 1997) and Kendrick v. Sullivan, 125 FRAT 1 (D.D.C. 1989). Interrogatory 19 is an inquiry into an issue of pure law because it asks the Staff what legal standard it applies to a particular type of case and does not require any application of the law to the facts raised in this particular case.

INTERROGATORY 20

Please provide complete answers to interrogatory Nos. 5 and 6 of TVA’s first set of interrogatories, since, as Judge Young pointed out during the November 14, 2001, teleconference, statements by one member of the panel is not a ruling by the panel.

RESPONSE

Questions regarding when the Staff first reviewed the DOL investigative file or the TVA OIG’s investigative file on Fiser’s 1993 complaint is irrelevant to the matters at issue in this proceeding. The actions by the Staff, the Office of Investigations, and the Office of Enforcement are not relevant in this *de novo* proceeding. As discussed in the January 9, 2002 Prehearing Conference, this hearing is limited to a determination of whether the licensee was in violation of the Commission’s regulations as set forth in the two paragraphs of the Notice of Violation. See Prehearing Conference, January 9, 2002, pages 157-162.

INTERROGATORY 21

Please provide complete answers to interrogatory Nos. 9, 18, and 21 of TVA's first set of interrogatories, since discovery is now complete and the purported basis for the Staff's delay is obviated.

RESPONSE

Interrogatory 9: See Staff response to Interrogatory 12.

Interrogatory 18: See Staff response to Interrogatory 13.

Interrogatory 21: The Staff makes no contention regarding whether or not the SRB's ranking of applicants for the Program Manager positions should be disregarded in determining if there was a preselection.

TVA has copies of all documents pertinent to these responses or identified therein.

Respectfully submitted,

/RA/

Jennifer M. Euchner
Counsel for NRC Staff

Dated at Rockville, Maryland
this 22nd day of January, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Browns Ferry Nuclear Plant, Units 1, 2, 3))
) EA 99-234

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO TENNESSEE VALLEY AUTHORITY'S SECOND SET OF INTERROGATORIES" 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 22nd day of January, 2002.

Administrative Judge **
Charles Bechhoefer, Chairman
U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
Washington, D.C. 20555

Administrative Judge **
Richard F. Cole
U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
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