

January 22, 2001

Mr. Luis A Reyes
Regional Administrator
Region II
U. S. Nuclear Regulatory Commission
Atlanta Federal Center
61 Forsyth Street, SW, Suite 23T85
Atlanta, Georgia 30303

Dear Mr. Reyes:

REPLY TO NOTICE OF VIOLATION - IA 99-043

This responds to the NRC's February 7, 2000, letter entitled "NOTICE OF VIOLATION (NUCLEAR REGULATORY COMMISSION'S OFFICE OF INVESTIGATIONS REPORT NO 2-98-013)". The Notice of Violation (NOV) found that I engaged in deliberate misconduct that caused the Tennessee Valley Authority (TVA) to be in violation of 10 CFR 50.7 by discriminating against Gary Fiser, a former employee of TVA, when I took actions to cause his nonselection to a position within Operations Support after a 1996 reorganization. These actions, the NRC found, were taken in part in retaliation of Mr. Fiser's identification of previous chemistry related nuclear safety concerns in 1991-1993, and his previous Department of Labor complaint in 1993.

I respectfully disagree with the NRC's conclusions and deny that any of my actions constituted "deliberate misconduct" in violation of 10 CFR 50.5 of the NRC's regulations.

At the outset, let me first say that I have carefully read TVA's "REPLY TO A NOTICE OF VIOLATION - ANSWER TO A NOTICE OF VIOLATION (PROPOSED IMPOSITION OF CIVIL PENALTY) - NUCLEAR REGULATORY COMMISSION'S OFFICE OF INVESTIGATIONS (OI) REPORT NO. 2-98-013 - ENFORCEMENT ACTION 99-234." I fully agree with and endorse the discussion of the facts and the conclusions contained in TVA's submittal.

As you know, I attended a predecisional enforcement conference on November 22, 1999, in NRC's Region II Office in Atlanta, Georgia. In that conference, I explained as best and honestly as I possibly could the circumstances surrounding my involvement with Gary Fiser and his consideration for one of two available positions in the new corporate Chemistry Program in 1996. It seems that throughout this process, first OI and now the NRC have disregarded, without explanation, TVA's and my evidence of legitimate and nondiscriminatory reasons. The NRC's NOV which was issued to me attributes the worst motives to me to conclude that I was motivated, at least in part, to discriminate against

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Mr. Fiser because of his past raising of safety concerns and his filing of a Department of Labor (DOL) complaint. I cannot express too strongly how wrong that conclusion is.

In addition to my review of TVA's response and the information referred to therein, I have carefully reviewed the information you provided in response to TVA's February 8, 2000, and my February 9, 2000, letters, and can only conclude that the NRC's NOV is based on a construct of opinions, hearsay, and assumptions, which ignores relevant facts.

In an attempt to connect me to Fiser's protected activity, NRC's September 20, 1999, letter to me wrongly states that I was named as culpable party in Fiser's 1993 DOL complaint. That was not merely an "inaccurate" statement as the NRC claims in its February 7, 2000, letter. Nor was that mistake due to an innocent misreading of the 1993 DOL complaint. That mistake was made because OI's investigation failed to obtain and review the 1993 DOL complaint, failed to review DOL's file on that complaint, and failed to review TVA's Office of Inspector General (OIG) investigation of the matter.

Even though that mistake was identified to NRC, its February 7, 2000, letter continues to assert that I had "knowledge of Mr. Fiser's prior protected activity" and "personal knowledge of Mr. Fiser's chemistry related nuclear safety concerns." The only basis for these assertions is the speculation about the likelihood of my awareness "given [my] position in the organization and the number of TVA employees who were involved in the various DOL and TVA Inspector General interviews." If OI had obtained the records of Fiser's 1993 DOL complaint and DOL's and OIG's files on that complaint, the NRC would have realized that my position in the organization and the limited number of employees interviewed, none of whom were in my organization, were reasons to assume that I had no prior awareness of that complaint. As stated in more detail in TVA's response, these shortcomings and others call into question the credibility of the entire NRC investigation. I cannot tell you strongly enough that I had no knowledge, and no reason to know, of Fiser's 1993 DOL complaint prior to June 1996.

The NRC's February 7, 2000, letter states (at 2) that I was aware of "Fiser's chemistry related nuclear safety concerns identified in 1991-1993." That letter also states (at 1) that his 1993 DOL complaint "was based, in part, on these chemistry related nuclear safety concerns." I state again that I was unaware of a 1993 DOL complaint or the basis for that complaint. However, in my position as Nuclear Safety Review Board (NSRB) chairman, I was aware of numerous deficiencies in the Sequoyah chemistry program that had potential nuclear safety relevance. These concerns had been raised by several organizations including Nuclear Quality Assurance, NSRB, Corporate Chemistry, and Site Chemistry. The pertinent NSRB meeting minutes in 1991-1992 (which are part of OI's investigation) clearly show that as NSRB chairman I pressed for resolution of all deficiencies, regardless of identification source, and encouraged site management and corporate chemistry assistance in resolving these matters. In fact, the February 1992 minutes indicate that many of the deficiencies appeared to be recurrences of problems previously identified by

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the pre-restart Operational Readiness review teams, of which I was a member. NRC provides no basis to conclude that I was in any way biased against any individual who raised concerns similar to those which I had been a party to identifying.

It seems especially dangerous that NRC would use statements and findings of safety review groups such as TVA's NSRB, whose charge it is to oversee the safe operations of nuclear facilities, as a basis for inferring discriminatory intent on behalf of group members. As a member of the NSRB, I was frequently exposed to and part of self assessments and a questioning approach. Why should the NRC infer from that alone that I would later want to retaliate against somebody for raising safety or performance questions? If that was my attitude, I would be motivated to retaliate against many individuals beyond Fiser. A practice by the NRC that would draw inferences of retaliatory intent based on the NSRB participation could rapidly send a chilling message to safety review boards. If identifying specific problems may be later used by employees as bases for successful discrimination complaints against the individual board members, reasonable managers would not participate.

NRC is also creating unrealistic performance standards in order to support a conclusion that I did not take adequate action to ensure an unbiased selection process in 1996. NRC based this conclusion on the fact that two selection board members and the selection official had some knowledge of Fiser's 1993 DOL complaint. In stating that "you failed to take adequate actions to determine whether anyone else should be excluded from the selection process," the NRC indicates that anyone who may have knowledge of any of the candidates' protected activity should be excluded. This standard would make forming a qualified selection board and adequate conduct of the selection process virtually impossible. It was not my intent to exclude everyone who might any have knowledge but only those who were "intimately involved." This certainly does not reflect an intent to plot against Fiser; rather, it reflects the reality of the selection process. By using a selection review board, we were actually employing a more neutral and more thorough evaluation process than if I had simply made all the decisions myself. Under the NRC's standard, individuals could effectively shield themselves from any adverse action, no matter how legitimate and nondiscriminatory, by threatening to file a DOL complaint.

As discussed during the enforcement conference in November 1999, in my almost 30 years experience in nuclear power, most of my positions had nuclear safety as my primary concern and responsibility. I was a Naval Reactors field representative for eight years with nuclear safety responsibilities very similar to an NRC Senior Resident. After coming to TVA, I was chairman of NSRB for about eight years and participated on or led several nuclear safety review teams, including the Operational Readiness Reviews for Sequoyah, Browns Ferry, and Watts Bar. In these capacities, I have personally raised numerous potential nuclear safety issues. Given my background, NRC provides no basis for assuming that I would be biased or would take some type of retaliatory actions against any

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individual raising safety concerns. There is no evidence in any of the material provided by NRC that indicates any motivation for such action on my part.

Finally, I would like to emphasize how unrealistic the theory is behind the NRC's NOV and Fiser's 1996 DOL complaint. Specifically, the NRC's theory involves the following:

- OI and Fiser contend that at a November 1991 NSRB meeting he disagreed with several NSRB members, including myself, on an issue involving trending of chemistry data. Trending deficiencies were subsequently mentioned in the NSRB minutes as one of several examples of deficiencies identified by various organizations. Obviously, NSRB's identification of trending deficiencies did not constitute protected activity by Fiser.
- OI and Fiser's 1996 DOL complaint claimed that he filed a 1993 DOL complaint in which he claimed that his termination from Sequoyah was orchestrated due to his refusal to provide trending of chemistry data. As discussed in detail in TVA's response, this is a totally inaccurate representation of his 1993 complaint.
- It is further alleged that nearly five years after the issue regarding trending, I orchestrated a reorganization of the Operations Support organization, resulting in elimination of over a dozen jobs, in order to retaliate for this disagreement.
- In 1996 Fiser claimed that the posting of new positions was inconsistent with the settlement of his 1993 complaint. He then filed his 1996 DOL complaint alleging that the reorganization of Chemistry and the posting of new positions was retaliatory towards him.
- The NRC's NOV claims that after Fiser filed his 1996 DOL complaint and after the attention of DOL and OIG had been focused on the process, Wilson McArthur and I somehow conspired to act against Fiser and influenced several Human Resource managers, three independent Selection Review Board members, and the Office of the General Counsel to create a selection process that was so unfair that it ensured his nonselection.

I do not agree with these assertions and characterizations. But even if you give a certain benefit of the doubt, the theory in total is, as the NRC has concluded, that because I had formed such a strong retaliatory animus against Fiser in 1991 based upon no more than some trending deficiencies discussed in the NSRB, after five years had passed I orchestrated a scheme to retaliate against him. In addition, in the face of accusations by Fiser and scrutiny by DOL and OIG, I manipulated a number of persons and organizations "in implementing a reorganization and selection process to ensure that Mr. Fiser was not selected." In my opinion, that theory is totally unrealistic and ridiculous.

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In summary, I deny the violation. The reorganization of Operations Support was done for legitimate business reasons. The resulting selection process for all positions was done fairly and in accordance with TVA procedures. In the case of the chemistry positions, extra efforts were taken involving Human Resource personnel involved in DOL matters and the Office of General Counsel to ensure a fair and unbiased process.

Sincerely,

Thomas J. McGrath
Senior Portfolio Manager
Bulk Power Trading

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