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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 letter dated February 7, 2000, 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 caused TVA to be in violation of 10 CFR § 50.7, or that 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.

BJ000397

CLEAR REGULATORY COMMISSION

Docket No. 50-390 Official Est. No. Joint 51

In the matter of TV4

Staff Joint IDENTIFIED

Applicant Joint RECEIVED

Intervenor _____ REJECTED _____

Other _____ WITHDRAWN _____

DATE 5/2/02 Witness _____

Clerk BHM

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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 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. I felt my discussion was complete and that I fully answered each and every question that was put to me in a forthright manner to the very best of my recollection. However, when I examine the NRC's NOV, I find that my merely having prior knowledge about Mr. Fiser's DOL complaint has been interpreted as evidence of my engaging in discrimination against Mr. Fiser. I cannot express too strongly to you how wrong that conclusion is.

Since receiving NRC's February 7, 2000, letter, I have thought many times about whether I could have expressed myself better about what went on during the many years that spanned the events in question from 1991 through 1996. I have studied the transcript of my interview with Diana Benson of OI (April 12, 1999), the transcript of my Predecisional Enforcement Conference (November 22, 1999), and the transcript of TVA's Predecisional Enforcement Conference (December 10, 1999). In doing so I have come to the conclusion that the facts, presented on several occasions, give ample evidence that the selection process and my participation in that process were fair and unbiased. However, given this additional opportunity, I would like to address the three areas of concern raised in NRC's February 7, 2000, letter to me in order to make sure that NRC has a full and complete understanding of the circumstances and events surrounding my involvement in Mr. Fiser's nonselection.

1. The NRC states that my involvement in the implementation of the reorganization and selection process was, at least in part, motivated by my knowledge of Mr. Fiser's protected activity. It states that, based on my interview with the TVA Inspector General (IG) in January 1994, I had personal knowledge of Mr. Fiser's chemistry related nuclear safety concerns identified in 1991-1993, and his 1993 DOL complaint.

I have explained many times the role which I played in the reorganization and selection process; however, I strongly disagree with NRC's finding that my knowledge about Mr. Fiser's chemistry related nuclear safety concerns and DOL complaint in any way influenced my role. That is absolutely not the case.

NRC's letter cites my interview with TVA's IG in January 1994 as the basis for its statement that I had personal knowledge of Mr. Fiser's chemistry related nuclear safety concerns identified in 1991-1993, and his 1993 DOL complaint. However, as I read my IG interview statement,¹ my testimony was that in the 1992 time frame, it was my

¹ Page 1 of "Tennessee Valley Authority, Office of the Inspector General, Record of Interview," dated January 10, 1994. This document was not provided as part of the

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recollection that the Nuclear Safety Review Board (NSRB), among others, had identified problems in the Sequoyah Nuclear Plant (SQN) Chemistry Program, and it was Mr. Fiser who was looked upon as causing the problems. No mention is made that I was in any way aware that Mr. Fiser had raised any safety concerns.

Upon examination of my interview with OI's Diana Benson, conducted five years after my IG statement, I again explained my best recollection about Mr. Fiser's 1993 DOL complaint. My recollections also centered around NSRB's concerns about Mr. Fiser's failure to adequately track and trend certain chemistry data (pages 12-17). Once again, my statements about Mr. Fiser's activities cannot be read to support my having had personal knowledge about Mr. Fiser raising chemistry related nuclear safety concerns. In fact, upon examining the information provided by the NRC to TVA on December 7, 2000, I draw your attention to the OI Report (page 7), and Exhibit 1 of that report entitled, "Investigation Status Record," dated April 29, 1998. These documents state that Mr. Fiser filed a DOL/10 CFR 50.7 complaint in 1993 (OI Case No. 2-93-068) which the *NRC found was unsubstantiated due to a lack of protected activity*. I am concerned about how NRC could have come to the conclusion that Mr. Fiser had not engaged in any protected activity, or translated another way, had not raised any safety concerns (which is consistent with my recollections), yet it now chooses to mischaracterize my statements as amounting to having personal knowledge about Mr. Fiser's chemistry related nuclear safety concerns.

I am aware that it is against the law to take any adverse action against an individual because he or she has filed a DOL complaint, and I never denied that I knew about Mr. Fiser's 1993 complaint. However, I also have explained that Mr. Fiser's 1993 complaint never named me as a culpable party, as NRC erroneously stated in its letter of September 20, 1999. I was particularly dismayed about this statement because it was made after OI had completed its investigation and NRC was notifying me of its results. As I demonstrated by providing NRC with an actual copy of the 1993 DOL complaint, Mr. Fiser's mention of me was in the role of an ally. My association with Mr. Fiser's protected activity, that is his filing of the 1993 DOL complaint, did not place me in an adversarial role, and in fact I came to Mr. Fiser's defense. I can only question how that fact can now be construed as a basis for bearing some animus toward Mr. Fiser. What remains is a baseless conclusion that my mere knowledge of Mr. Fiser's 1993 DOL complaint, in which I supported his efforts, is somehow interpreted to serve as a motivating factor for discriminating against him three years later in 1996. This is plain wrong, and there is no evidence whatsoever to support this finding.

information requested by TVA on February 18, 2000, and provided by NRC on December 7, 2000, though it was obviously relied upon by NRC in reaching its decision in the case.

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2. The NRC states that I was aware that one individual from Human Resources recused himself from the selection process because of his prior knowledge of Mr. Fiser's 1993 DOL activities, and his knowledge that Mr. Fiser expressed an intent to file an additional DOL complaint. However, I took no actions to remove myself from the selection process, notwithstanding my knowledge of Mr. Fiser's 1993 DOL activities.

As I stated above, I never had any negative reaction or feelings about Mr. Fiser's past DOL activities, and I was never in any adversarial role with Mr. Fiser in connection with those activities. Given my state of mind and my feelings that any prior DOL activity was a non-issue in the selection process, it frankly did not occur to me that I should recuse myself from any part of the selection process. I especially agree with Section III.(C) Policy Considerations, of TVA's submittal that it is especially concerning when an inference of discriminatory motive relating to protected activity may be drawn based on the mere knowledge of that protected activity. If this were the case, mere knowledge of some protected activity would become something for managers to avoid. This would discourage managers from becoming aware of safety issues or other protected activity, for fear of spreading the "knowledge." This would also run counter to sound policy that should encourage managers to become involved in these issues to resolve safety concerns and to assure no retaliation. It would also severely limit my ability to effectively manage an organization because I could take no action, and make no decisions, where any protected activity was involved. As I am sure the NRC must be aware, there is considerable amount of protected activity, as that term is presently defined, which takes place at a nuclear utility. Adopting such a standard would seriously degrade plant safety.

Insofar as the actions of the individual from Human Resources is involved, I did not know, and do not now know, the extent of that individual's involvement with Mr. Fiser's past DOL-related activities. I can and will make no judgment about the individual's decision to recuse himself. I can only say that I knew my own state of mind, that I bore absolutely no animus toward Mr. Fiser for any DOL-related or any other protected activity, and I had no doubts about my objectivity in the selection and decisionmaking process. I relied on that process, as I had done several times before, to arrive at the best, fairest result. That was the result in Mr. Fiser's case, of that I am sure.

3. Certain selection review board members also had knowledge of Mr. Fiser's DOL complaint, and discussed this prior protected activity just before convening to interview applicants for the two vacant Chemistry Program Manager positions, including Mr. Fiser. The NRC considered it more likely than not that I permitted the selection process to continue, in spite of this situation.

As I and others have pointed out on several occasions, two of the three selection review board (SRB) members had some prior knowledge of Mr. Fiser's past DOL activities. I discussed my best recollections of the events that occurred just prior to convening the

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SRB. I didn't think the matter was proper for discussion, but I felt the remarks were intended to make sure that the evaluation was done scrupulously in light of the DOL activities. I did not believe that the remarks would taint the selection process. (See my April 20, 1999, OI interview transcript, page 58; and my November 22, 1999, Predecisional Enforcement Conference transcript, pages 52-53.)

To be sure, I, Tom McGrath, and TVA went to great lengths to explain how the SRB process was carried out as objectively as possible. Each of the SRB members were present at TVA's predecisional enforcement conference and gave detailed accounts of how the selection process was handled. Questions to be asked of the candidates were agreed to ahead of time, the exact same questions were asked of each of the candidates by the same SRB members, and the candidates were individually scored with no collaboration among the SRB members. It was also made clear that one of the three members of the SRB was not aware of any prior DOL activity by Mr. Fiser, and that this SRB member did not hear any of the remarks made prior to the SRB meeting about prior DOL activity. Thus, there was absolutely no evidence or even an intimation that this individual was in any way "tainted" by mere knowledge of prior DOL activity. This same individual, however, consistently scored Mr. Fiser lower on the answers to the questions when compared to the other two individuals. A chart depicting all of the scores was entered into the record. Despite objective evidence of a lack of "taint" in the SRB selection process, there is absolutely no mention of this in any of NRC's analyses of the facts. Unfortunately, it seems that NRC is more comfortable arriving at conclusions based upon inferences rather than objective data.

I discussed at my predecisional enforcement conference the amount of upset that this case has caused me at this late point in my long professional career. I was not permitted to view the evidence that OI had developed before I met with the NRC, and I have never been able to confront any of those who have spoken against me. Yet, the NRC has determined that I have engaged in deliberate misconduct, and have caused TVA to be in violation of NRC's regulations. Nothing could be further from the truth. Finally, I cannot conclude without telling NRC how fundamentally unfair I feel this process has been. The attitude of those involved in deciding this matter has been prosecutorial, and was far from objective. What's more, I was asked to address events that took place nearly a full decade ago. The complaint that gave rise to this NOV occurred nearly five years ago.

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I hope the NRC gives serious consideration to the amount of upset it has caused to me and others associated with this case to endure this long, drawn out process. I sincerely hope the NRC will review the facts objectively and reverse its decision, not only in my case, but also in the matters involving Mr. McGrath and TVA.

Sincerely,

Wilson C. McArthur
(title)

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