

RAS 5972

50-390-CivP, et al.

Licensee Exhibit - Rec'd 5/1/02
113

September 4, 2001

TVA 113

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

6/11 In the Matter of

TENNESSEE VALLEY AUTHORITY
(Watts Bar Nuclear Plant, Unit 1
Sequoyah Nuclear Plant, Units 1 & 2

)
) Docket Nos. 50-390-CivP; 50-327-CivP
) 50-328-CivP; 50-259-CivP
) 50-260-CivP; 50-296-CivP
) 50-260-CivP; 50-296-CivP
)
) ASLBP No. 01-791-01-CivP
)
) EA 99-234

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

7-4-01

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) First Set of Interrogatories. The Staff notes that TVA's First Set of Interrogatories did not include an Interrogatory 10. The Staff has responded to these interrogatories as numbered by TVA in its First Set of Interrogatories.

INTERROGATORY 1

State the factual basis of your contention on page 3 of the February 7, 2000, Notice of Violation (NOV) and Proposed Imposition of Civil Penalty that Thomas J. McGrath was "knowledgeable and critical of Fiser's 1991-1993 protected activity involving chemistry related safety concerns." Include:

A. The specific "protected activity involving chemistry related safety concerns" in which Fiser was involved, the nature of his involvement, the dates of his involvement, the identity of all documents pertinent to his alleged protected activities, the identity of each person you contend had knowledge of such activity and the date and manner in which each such person became aware of such activity.

TVA Exh. 103

Template = SECY-028

SECY-02

UNION REGULATORY COMMISSION

Docket No. 50-390 Official Exh. No. TVA 113

In the matter of TVA

Staff _____ IDENTIFIED

Applicant RECEIVED

Intervenor _____ REJECTED _____

Other _____ WITHDRAWN _____

DATE 5/1/02 Witness _____

Clerk BHM

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USNRC

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OFFICE OF THE SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

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B. All evidence showing how and when McGrath became knowledgeable of Fiser's alleged protected activity, the identity of all persons with information as to how or when McGrath acquired such knowledge, and the identity of all documents pertinent to McGrath's knowledge of Fiser's alleged protected activity.

C. The facts upon which you base your conclusion that McGrath was "critical" of Fiser's alleged protected activity. Please describe in detail each and every instance in which McGrath was critical of Fiser's alleged protected activity as defined by you in response to subsection (a) above, including the dates, locations, persons present, the substance of all oral communications, and the identity of all written documents pertinent to such alleged criticism.

RESPONSE

A. The protected activity in which Fiser was involved includes conducting a review of the Chemistry Program; identifying specific problems with the program; discussing these problems with members of the Nuclear Safety Review Board (NSRB); entering these problems into TROI; and filing a 1993 DOL complaint.

B. McGrath became knowledgeable of Fiser's protected activities in his position as Chairman of the NSRB. In this position, he attended meetings with Fiser about the chemistry problems that Fiser had identified. Fiser Interview, OI Exhibit 3; and Jocher statement, OI Exhibit 4.

C. Ron Grover stated that McGrath made negative comments about Fiser. Grover statement, OI Exhibit 4. Rob Beecken told Fiser that McGrath was so upset with Fiser after a meeting with NSRB members that McGrath stated that Fiser was a problem and that TVA needed to get rid of him. OI Exhibits 2 and 4. Bill Jocher stated that McGrath was very upset with Fiser after Fiser brought the problems with the Chemistry department to his attention. Jocher statement, OI Exhibit 4. Dan Keuter stated that McGrath and McArthur stated that Fiser was not working out as the Corporate Chemistry Manager. Keuter statement, TVA-OIG Interview for 1993 DOL complaint.

INTERROGATORY 2

State the factual basis of your contention on page 3 of the NOV and Proposed Imposition of Civil Penalty that Wilson C. McArthur was "knowledgeable and critical of Fiser's 1991-1993 protected activity involving chemistry related safety concerns." Your answer should include:

A. The specific "protected activity involving chemistry related safety concerns" in which Fiser was involved, the nature of his involvement, the dates of his involvement, the identity of all documents pertinent to his alleged protected activities, the identity of each person you contend had knowledge of such activity, and the date and manner in which each such person became aware of such activity.

B. All evidence showing how and when McArthur became knowledgeable of Fiser's alleged protected activity, the identity of all persons with information as to how or when McArthur acquired such knowledge, and the identity of all documents pertinent to McArthur's knowledge of Fiser's alleged protected activity.

C. The facts upon which you base your conclusion that McArthur was "critical" of Fiser's alleged protected activity. Please describe in detail each and every instance in which McArthur was critical of Fiser's alleged protect[ed] activity as defined by you in response to subsection (a) above, involving the dates, locations, persons present, the substance of all oral communications, and the identity of all written documents pertinent to such alleged criticism.

RESPONSE

A. The protected activity in which Fiser was involved includes conducting a review of the Chemistry Program; identifying specific problems with the program; discussing those problems with members of the NSRB; entering those problems into TROI; filing a 1993 DOL complaint; and providing information to TVA-OIG in its investigation of a complaint by Jocher.

B. McArthur stated that he was aware that the subject of Fiser's 1993 DOL complaint involved disagreement between Fiser and members of the NSRB. McArthur Interview, OI Exhibit 10. McArthur was interviewed by TVA-OIG for the 1993 DOL complaint. Charles Kent stated that he and McArthur discussed the 1993 DOL complaint at the time it was occurring. Kent statement, OI Exhibit 4. McArthur stated that he became aware that Fiser was tape recording his conversations during the investigation of the Jocher complaint. McArthur stated that he thought

this was unprofessional. McArthur statement, OI Exhibit 4 and McArthur Interview, OI Exhibit 10. Ben Easley stated that he and McArthur discussed Fiser's tapes and that they did not think that the taping was professional or fair to the people being taped. Easley Interview, OI Exhibit 20.

C. Grover stated that McArthur distrusted Fiser because he had tape recorded conversations with McArthur and that McArthur had a problem with Fiser because of his past DOL complaint. Grover statement, OI Exhibit 4. Jocher stated that McArthur told him that Sequoyah wanted Fiser fired and then directed Jocher to RIF Fiser, even though there were open positions that Fiser could have filled. Jocher Interview, OI Exhibit 15. Dan Keuter stated that McGrath and McArthur stated that Fiser was not working out as the Corporate Chemistry Manager and that McArthur and Keuter reached a consensus that Fiser should be demoted. Keuter statement, TVA-OIG Interview for 1993 DOL complaint. Fiser stated that after the selection process in 1996, McArthur specifically stated that he would not talk to him because Fiser had tape recorded him in the past. Fiser Interview, OI Exhibit 3. McArthur stated that he thought Fiser's taping was unprofessional and that he felt he had to be careful about what he said around Fiser. McArthur Interview, OI Exhibit 10. Easley stated that he and McArthur discussed the tape recordings and felt that they were unprofessional and unfair to the individuals being recorded. Easley Interview, OI Exhibit 20.

INTERROGATORY 3

With respect to the assertion on page 3 of the NOV that McGrath's and McArthur's actions with regard to Fiser's alleged protected activity in 1991-1993 were part of the "information developed associated with the 1993 DOL case", specifically identify and describe in detail all such "information developed associated with the 1993 DOL case." Your answer should include the identity of each pertinent document.

RESPONSE

See response to Interrogatories 1 and 2.

INTERROGATORY 4

INTERROGATORY 5

INTERROGATORY 6

INTERROGATORY 7

State the factual basis for the conclusion in the NOV at 2-3 that the reorganization of Operations Support was motivated by a retaliatory animus by McGrath. Identify all pertinent documents, identify each person with information regarding such conclusion and state the information you impute to each such person.

RESPONSE

The February 7, 2000, NOV does not contain a conclusion that "the reorganization of Operations Support was motivated by a retaliatory animus by McGrath." Page 2 of the NOV states that "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 Staff contends that the manner in which the reorganization was carried out by McGrath and McArthur was motivated by a retaliatory animus. The basis for this conclusion is the information provided in response to Interrogatories 1 and 2, coupled with the temporal proximity between when McGrath and McArthur again became part of Fiser's chain of command and when Fiser's position was reorganized out of existence by McGrath. The disparate treatment of Fiser in requiring him to compete for one of the Chemistry Manager positions, but not requiring McArthur to compete for the RadChem Manager position under similar circumstances also evinces a retaliatory animus. In addition, McGrath was not required to reduce the Chemistry Department by 40% within the first year, but had five years to make this cut. McGrath could have

avoided eliminating one of the positions by only cutting the Chemistry department by 17%, which was the goal for FY 1997.

INTERROGATORY 8

Do you contend that McGrath ever made any statements evidencing such animus? If so, state the substance of such statements and identify the time, date, and place such statements were made and all persons present when such statements were made.

RESPONSE

See response to Interrogatory 7.

INTERROGATORY 9

State whether you contend that the newly created position of Chemistry Program Manager (PWR) was interchangeable under OPM regulations with the Chemistry and Environmental Program Manager position held by Fiser so that the new position did not require posting, and if so, state the basis for your contention. Identify all pertinent documents, identify each person with information regarding such conclusion, and state the information you impute to each such person.

RESPONSE

The staff has made no contentions regarding the interchangeability of these two positions. In addition, the staff objects to further response to this interrogatory on the ground that it requests a legal conclusion that constitutes attorney-work product.

INTERROGATORY 11

State the factual basis for the conclusion on page 3 of the NOV that it is "likely that an individual was preselected for one of the Chemistry Program Manager positions." -

RESPONSE

David Voeller stated that he received a call from Sam Harvey the week of June 3, 1996. During this conversation, Voeller stated that Harvey told him that he would be working more closely with him as the PWR Chemistry Manager. Harvey also stated that the reason he was not transferred out to Sequoyah was because he was wanted at corporate for the PWR position. Voeller stated that Harvey told him that it was a done deal, that they would post the position as a formality in order to keep it legal, and that he felt sorry for Fiser as the odd man out. Voeller statement, OI Exhibit 4, and Voeller deposition, OI Exhibit 16. Voeller told Fiser, Grover, and Cox about these statements by Harvey. Fiser Interview, OI Exhibit 3; Grover Interview, OI Exhibit 8; and Cox Interview, OI Exhibit 19. Grover stated that McGrath did not want Harvey transferred to Sequoyah because he wanted Harvey in the PWR position. Grover statement, OI Exhibit 4 and Grover Interview, OI Exhibit 8. Dave Goetcheus told Voeller that Harvey would get the PWR position. OI Exhibit 5.

INTERROGATORY 12

State the basis for your contention on page 3 of the NOV that the conversation among certain members of the Selection Review Board (SRB) prior to the interviews for the Chemistry Program Manager positions was "[o]f particular relevance" to your determination that Fiser was discriminated against.

RESPONSE

Prior to starting the interviews, Kent, one of the members of the SRB, stated in front of McArthur and John Corey that Fiser had filed a DOL complaint. Corey statement, McArthur statement, OI Exhibit 4; McArthur Interview, OI Exhibit 10; Corey Interview, OI Exhibit 11; McArthur Predecisional Enforcement Conference Transcript, November 22, 1999. Kent stated that he mentioned the DOL complaint to McArthur and said that McArthur should not participate in the SRB

because of the DOL issue. TVA Predecisional Enforcement Conference Transcript, December 10, 1999.

INTERROGATORY 13

INTERROGATORY 14

Identify all of the "other reasons" which were relied upon, as stated on page 3 of the NOV, in "conclud[ing] that discrimination was at least a factor in Mr. Fiser's non-selection." Separately state the detailed factual basis which you contend supports such "other reasons." Identify all pertinent documents, identify each person with information regarding such conclusion, and state the information you impute to each such person.

RESPONSE

The "other reasons" for concluding that discrimination was a factor in Fiser's non-selection include: (1) Easley was removed from the SRB as a facilitator (a non-voting member) because of his knowledge of Fiser's DOL activity, but Corey and Kent were permitted to participate as voting members despite having knowledge of Fiser's DOL activities and having on a prior occasion asked Fiser to leave a meeting while they discussed sensitive issues. This contradicts McGrath and McArthur's repeated statements that they were trying to have a fair and impartial SRB. Fiser Interview, OI Exhibit 3; McGrath statement, OI Exhibit 4; DOL Summary Disposition Opinion, OI Exhibit 5. (2) McArthur did not report Kent's statement about Fiser's DOL activity, which could have impacted the impartiality of the members of the SRB, to Human Resources or to McGrath, yet he

reported Jack Cox's statement in favor of Fiser to Human Resources and McGrath and stated that Cox was biased in favor of Fiser. McArthur statement and McGrath statement, OI Exhibit 4; McGrath Interview, OI Exhibit 9; McArthur Interview, OI Exhibit 10. (3) Approximately three months after McGrath and McArthur became Fiser's supervisors, his position was posted and he was not selected for the position. This temporal proximity results in an inference of retaliatory intent. (4) The performance appraisals of the candidates for the PWR position were not included in the interview packages provided to the SRB members. Fiser Interview, OI Exhibit 3. A review of Fiser's performance appraisals demonstrated that he consistently received higher ratings than Harvey. (5) McGrath was only required to cut 17% of the Chemistry budget for FY 1997, and had five years to complete the 40% budget reduction, but he decided that the Chemistry department should complete the entire budget cut in one year. (6) Cox was considered biased in favor of Fiser because of his statement about Fiser's work at Watts Bar, and therefore McArthur and McGrath felt he should be excluded from the SRB. McGrath Interview, OI Exhibit 9, and McArthur Interview, OI Exhibit 10. However, McArthur and McGrath did not feel that Kent should be excluded from the SRB as a result of his attempts to get Harvey transferred to Sequoyah.

INTERROGATORY 15

INTERROGATORY 16

State whether you contend as stated on page 17 of the July 30, 1999, Office of Investigations (OI) [R]eport No. 2-1998-013 that "McGrath decided that the new positions needed to be advertised." If so, state the details and factual basis for your contention.

RESPONSE

The Staff contends that McGrath and Ed Boyles decided that the new Chemistry Manager positions had to be advertised. McGrath Interview, OI Exhibit 9; Boyles Interview, OI Exhibit 24; McGrath Predecisional Enforcement Conference Transcript, November 22, 1999, and TVA Predecisional Enforcement Conference Transcript., December 10, 1999.

INTERROGATORY 17

State the factual basis for your contention that retaliatory animus played a part in the decision to post the new PWR position. Identify each person with knowledge of such information, identify the information you attribute to each such person, and identify all documents pertinent to this contention.

RESPONSE

On prior occasions before McGrath and McArthur became Fiser's supervisors, individuals testified that each of them had stated that Fiser should be removed from TVA. Grover stated that McGrath made negative comments about Fiser. Jocher stated that McGrath's attitude toward Fiser was volatile and that McGrath was upset with Fiser for having brought problems with the Chemistry program to the attention of the NSRB. Grover statement, Jocher statement, OI Exhibit 4. Beecken told Fiser that McGrath wanted him removed from TVA. Fiser interview, OI Exhibit 3. Grover stated that McArthur distrusted Fiser because he had taped conversations with him previously. Grover statement, OI Exhibit 4. Jocher stated that McArthur told him that Sequoyah wanted Fiser fired and that McArthur directed him to RIF Fiser. Jocher Interview, OI Exhibit 15. Then, approximately three months after McArthur and McGrath became Fiser's first and second line supervisors, Fiser's position was posted and he was not selected for a position. In addition, McGrath decided to cut the Chemistry department by the entire 40% in one year, when he could

have waited until FY 2001 to determine whether the budget cuts would require cutting a position or whether the cuts could be made through attrition.

INTERROGATORY 18

Do you contend that the position which was filled by McArthur should have been posted. If so, identify each person with knowledge of such information, identify the information you attribute to each such person, and identify all documents pertinent to this contention.

RESPONSE

The staff objects to this interrogatory on the ground that it calls for a legal conclusion that constitutes attorney work product.

INTERROGATORY 19

INTERROGATORY 20

INTERROGATORY 21

State whether you contend that the rankings by the SRB in which Fiser was ranked lowest of all three members of the Board should be disregarded in determining if there was a pre-selection. If so, state the detailed factual basis for such contention. Identify each and every fact and document pertinent to such contention, identify each individual who(m) you contend has information pertinent to such contention and identify the information which you impute to each individual.

RESPONSE

The staff has made no contention regarding the SRB's ranking of applicants for the Program Manager positions. The staff objects to further response to this interrogatory on the ground that it calls for a legal conclusion that constitutes attorney work product.

INTERROGATORY 22

State whether you contend as stated on page 17 of the OI [R]eport No. 2-1998-013 that Cox was eliminated from participating on the SRB, and if so, state the detailed factual basis for your contention. Identify all pertinent documents, identify each person with information regarding such conclusion, and state the information you impute to each such person.

RESPONSE

The Staff contends that Jack Cox was unable to participate in the SRB because of a scheduling conflict. However, the Staff also contends that had Cox been available to serve on the SRB, then McArthur and McGrath would have excluded him from participating in the SRB based on his statement in favor of Fiser. McGrath Interview, OI Exhibit 9 and McArthur Interview, OI Exhibit 10.

INTERROGATORY 23

INTERROGATORY 24

INTERROGATORY 25

INTERROGATORY 26

Do you contend that McGrath could have transferred Harvey, or allowed Harvey to transfer to Sequoyah consistent with TVA and Federal regulations, and authorized headcounts and budgets. If so, state the basis of your contention and identify all pertinent documents, identify each person with information regarding such conclusion, and state the information you impute to each such person.

RESPONSE

The staff does not have sufficient information for answering this question. In addition, the staff objects to further response to this interrogatory on the ground that it calls for a legal conclusion that constitutes attorney work product.

INTERROGATORY 27

INTERROGATORY 28

INTERROGATORY 29

INTERROGATORY 30

Respectfully submitted,

A handwritten signature in cursive script that reads "Jennifer M. Euchner". The signature is written in black ink and is positioned above the typed name.

Jennifer M. Euchner
Counsel for NRC Staff

Dated at Rockville, Maryland
this 4th day of September, 2001

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
TENNESSEE VALLEY AUTHORITY)	Docket Nos. 50-390-CivP; 50-327-CivP;
)	50-328-CivP; 50-259-CivP;
(Watts Bar Nuclear Plant, Unit 1;)	50-260-CivP; 50-296-CivP
Sequoyah Nuclear Plant, Units 1 & 2)	ASLBP No. 01-791-01-CivP
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 FIRST SET OF INTERROGATORIES" and "NOTICE OF APPEARANCE" for Jennifer M. Euchner in the above-captioned proceeding have been served on the following by deprecit 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 4th day of September, 2001.

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

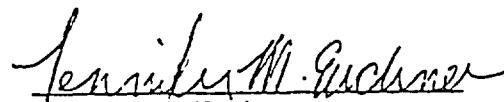
Administrative Judge **
Ann Marshall Young
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U.S. Nuclear Regulatory Commission
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Thomas F. Fine **
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Knoxville, Tennessee 37901-1401

Administrative Judge **
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Atomic Safety and Licensing Board Panel
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Office of the Secretary *
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Jennifer M. Euchner
Counsel for NRC Staff

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;)
Browns Ferry Nuclear Plant, Units 1, 2, 3) ASLBP No. 01-791-01-CivP
)
) EA 99-234

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.713(b) the following information is provided.

Name of Attorney: Jennifer M. Euchner
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Office of the General Counsel
Mail Stop: O-15D21
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Telephone Number: (301) 415-3897
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Admissions: Court of Appeals of Maryland
Name of Party: NRC Staff

Respectfully submitted,


Jennifer M. Euchner
Counsel for NRC Staff

Dated at Rockville, Maryland
this 4th day of September, 2001

January 22, 2002

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

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

1-22-02

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

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

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

INTERROGATORY 13

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

INTERROGATORY 18

INTERROGATORY 19

INTERROGATORY 20

INTERROGATORY 21

Respectfully submitted,

A handwritten signature in cursive script that reads "Jennifer M. Euchner".

Jennifer M. Euchner
Counsel for NRC Staff

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

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
TENNESSEE VALLEY AUTHORITY) Docket Nos. 50-390-CivP; 50-327-CivP;
(Watts Bar Nuclear Plant, Unit 1;) 50-328-CivP; 50-259-CivP;
Sequoyah Nuclear Plant, Units 1 & 2) 50-260-CivP; 50-296-CivP
Browns Ferry Nuclear Plant, Units 1, 2, 3) ASLBP No. 01-791-01-CivP
) 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

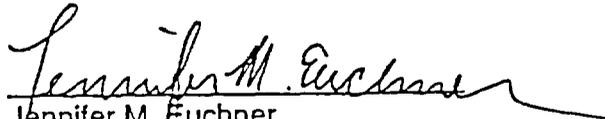
Administrative Judge **
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Jennifer M. Euchner
Counsel for NRC Staff



OFFICE OF THE
GENERAL COUNSEL

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

September 14, 2001

Barbara S. Maxwell, Esq. (E-mail and Regular Mail)
Tennessee Valley Authority
400 West Summit Hill Drive
Knoxville, Tennessee 37902-1401

**SUBJECT: IN THE MATTER OF TENNESSEE VALLEY AUTHORITY (WATTS BAR
NUCLEAR PLANT, UNIT 1; SEQUOYAH NUCLEAR PLANT, UNITS 1 & 2;
BROWNS FERRY NUCLEAR PLANT, UNITS 1,2 & 3)**

Dear Ms. Maxwell:

I am writing in response to your letter dated September 12, 2001, in which you requested further responses to TVA's First Set of Interrogatories. The NRC Staff has reviewed your requests and the Staff's original responses to these interrogatories. Although the Staff believes that its original responses to these interrogatories was adequate, the Staff is providing the following further objections, explanations, and responses.

Interrogatory 1(a): TVA asserted that the Staff's original response to this interrogatory neglects to identify pertinent dates, documents, and individuals with knowledge of Fiser's protected activity. The Staff has reviewed its original response to this interrogatory and is supplementing that information as follows.

Fiser engaged in the protected activity on or about the following dates: Fiser's review of the Chemistry Program, identification of specific problems, and entry of those problems into TROI occurred some time during the first half of 1992. Fiser met with the NSRB to discuss chemistry problems during 1992. Fiser filed a DOL complaint on September 3, 1993. The NRC Staff lacks any more specific information about the dates of such protected activity. The individuals with knowledge of Fiser's protected activities that have been identified at this point in the matter are: Fiser, McArthur, McGrath, Bill Lagergren (who instructed Fiser to perform the review of the Chemistry Program), John LaPoint (who instructed Fiser to enter the problems he identified into TROI), and Don Adams (who was present at the meeting between Fiser and LaPoint). Any documents related to this request will be identified and provided with the NRC Staff's response to TVA's First Set of Document Requests.

Interrogatory 1(c): TVA asserted that the Staff's original response to this interrogatory neglected to provide the dates, locations, persons present, substance of all communications, and the identity of written documents. The Staff has reviewed its original response and is supplementing that information as follows.

The NRC Staff does not currently have information regarding the dates, locations, or other persons present when McGrath made critical remarks about Fiser. The substance of the communications is provided in the Staff's original response. Any documents related to this request will be identified and provided with the NRC Staff's response to TVA's First Set of Document Requests.

Interrogatory 2(a): TVA asserted that the Staff's original response to this interrogatory neglects to identify pertinent dates, documents, and individuals with knowledge of Fiser's protected activity. The Staff has reviewed its original response to this interrogatory and is supplementing that information as follows.

Fiser engaged in the protected activity on or about the following dates: Fiser's review of the Chemistry Program, identification of specific problems, and entry of those problems into TROI occurred some time during the first half of 1992. Fiser met with the NSRB to discuss chemistry problems during 1992. Fiser filed a DOL complaint on September 3, 1993. The Staff does not know on what date(s) Fiser provided tape recorded conversations for investigation of the Jocher complaint. The individuals with knowledge of Fiser's protected activities that have been identified at this point in the matter are: Fiser, McArthur, McGrath, Bill Lagergren (who instructed Fiser to perform the review of the Chemistry Program), John LaPoint (who instructed Fiser to enter the problems he identified into TROI), Don Adams (who was present at the meeting between Fiser and LaPoint), and Bill Jocher.

Interrogatory 2(c): TVA asserted that the Staff's original response to this interrogatory neglected to provide the dates, locations, persons present, substance of all communications, and the identity of written documents. The Staff has reviewed its original response and is supplementing that information as follows.

The NRC Staff does not currently have information regarding the dates, locations, or other persons present when McArthur made critical remarks about Fiser. The substance of the communications is provided in the Staff's original response. Any documents related to this request will be identified and provided with the NRC Staff's response to TVA's First Set of Document Requests.

Interrogatory 3: TVA stated that the Staff's original response to this interrogatory did not describe any information developed associated with the 1993 DOL case. The Staff has reviewed its original response and is supplementing that information as follows.

The information developed in association with the 1993 DOL case was the problems with the Chemistry Program that Fiser identified and Fiser's meeting with members of the NSRB about these problems, as detailed in the Staff's response to Interrogatories 1 and 2.

Interrogatory 4:

Interrogatory 8: TVA stated that the Staff's original response to this interrogatory did not adequately respond. The Staff has reviewed its original response and is providing the following further response.

For further response to this interrogatory, see the Staff's original and supplemented response to Interrogatory 1(c). The Staff does not have knowledge at this time of the dates, times, or places of these statements.

Interrogatory 9: TVA asserted that the Staff may not object to interrogatories on the ground that they call for a legal conclusion. The Staff has reviewed TVA's assertions and the relevant case law and provides the following further explanation of its objection to this interrogatory.

Although Federal Rule of Civil Procedure 33 does permit some "contention interrogatories" which call for a legal conclusion, both the Advisory Committee Notes and federal rules case law limit the use of such interrogatories. First, inquiries into issues of "pure law" are not permissible interrogatories. See Abbott v. United States, 177 F.R.D. 92 (N.D.N.Y. 1997) and Kendrick v. Sullivan, 125 F.R.D. 1 (D.D.C. 1989). Interrogatory 9 does not ask a question of pure law. However, courts have held that responses to interrogatories which request application of the law to the facts of the particular case may best be asked (or responded to) after much or all of discovery is complete. IBP, Inc. v. Mercantile Bank of Topeka, 179 F.R.D. 316 (D. Kan. 1998) and Kendrick v. Sullivan, 125 F.R.D. 1 (D.D.C. 1989). See also Continental Illinois National Bank and Trust Co. v. WH Venture, 1986 U.S. Dist. LEXIS 29691 (E.D.Pa. Feb. 4, 1986), and

DeLoach v. Companhia de Navegacao Lloyd Brasileiro, 1985 U.S. Dist. LEXIS 16021 (E.D.Pa. Sept. 12, 1985). The reason for permitting such a delay is that a party's application of the law to the facts is best completed after that party has received all the factual information requested during discovery, in order to ensure that the response accurately reflects the position the party will take on that particular issue. Interrogatory 9 calls for a legal conclusion that would best and most accurately be answered by the Staff after TVA responds to the Staff's discovery requests and after depositions of relevant witnesses have been taken. Therefore, the Staff declines to respond to Interrogatory 9 at this time.

Interrogatory 13:

Interrogatory 18: TVA asserted that the Staff may not object to interrogatories on the ground that they call for a legal conclusion. The Staff has reviewed TVA's assertions and the relevant case law and provides the following further explanation of its objection to this interrogatory.

Although Federal Rule of Civil Procedure 33 does permit some "contention interrogatories" which call for a legal conclusion, both the Advisory Committee Notes and federal rules case law limit the use of such interrogatories. First, inquiries into issues of "pure law" are not permissible interrogatories. See Abbott v. United States, 177 F.R.D. 92 (N.D.N.Y. 1997) and Kendrick v. Sullivan, 125 F.R.D. 1 (D.D.C. 1989). Interrogatory 18 does not ask a question of pure law. However, courts have held that responses to interrogatories which request application of the law to the facts of the particular case may best be asked (or responded to) after much or all of discovery is complete. IBP, Inc. v. Mercantile Bank of Topeka, 179 F.R.D. 316 (D. Kan. 1998) and Kendrick v. Sullivan, 125 F.R.D. 1 (D.D.C. 1989). See also Continental Illinois National Bank and Trust Co. v. WH Venture, 1986 U.S. Dist. LEXIS 29691 (E.D.Pa. Feb. 4, 1986), and DeLoach v. Companhia de Navegacao Lloyd Brasileiro, 1985 U.S. Dist. LEXIS 16021 (E.D.Pa. Sept. 12, 1985). The reason for permitting such a delay is that a party's application of the law to the facts is best completed after that party has received all the factual information requested during discovery, in order to ensure that the response accurately reflects the position the party will take on that particular issue. Interrogatory 18 calls for a legal conclusion that would best and most accurately be answered by the Staff after TVA responds to the Staff's discovery requests and after depositions of relevant witnesses have been taken. Therefore, the Staff declines to respond to Interrogatory 18 at this time.

Interrogatory 21: TVA asserted that the Staff may not object to interrogatories on the ground that they call for a legal conclusion. The Staff has reviewed TVA's assertions and the relevant case law and provides the following further explanation of its objection to this interrogatory.

Although Federal Rule of Civil Procedure 33 does permit some "contention interrogatories" which call for a legal conclusion, both the Advisory Committee Notes and federal rules case law limit the use of such interrogatories. First, inquiries into issues of "pure law" are not permissible interrogatories. See Abbott v. United States, 177 F.R.D. 92 (N.D.N.Y. 1997) and Kendrick v. Sullivan, 125 F.R.D. 1 (D.D.C. 1989). Interrogatory 21 does not ask a question of pure law. However, courts have held that responses to interrogatories which request application of the law to the facts of the particular case may best be asked (or responded to) after much or all of discovery is complete. IBP, Inc. v. Mercantile Bank of Topeka, 179 F.R.D. 316 (D. Kan. 1998) and Kendrick v. Sullivan, 125 F.R.D. 1 (D.D.C. 1989). See also Continental Illinois National Bank and Trust Co. v. WH Venture, 1986 U.S. Dist. LEXIS 29691 (E.D.Pa. Feb. 4, 1986), and DeLoach v. Companhia de Navegacao Lloyd Brasileiro, 1985 U.S. Dist. LEXIS 16021 (E.D.Pa. Sept. 12, 1985). The reason for permitting such a delay is that a party's application of the law to the facts is best completed after that party has received all the factual information requested during discovery, in order to ensure that the response accurately reflects the position the party will take on that particular issue. Interrogatory 21 calls for a legal conclusion that would best and most accurately be answered by the Staff after TVA responds to the Staff's discovery requests and after depositions of relevant witnesses have been taken. Therefore, the Staff declines to respond to Interrogatory 21 at this time.

Interrogatory 23:

Interrogatory 24:

Interrogatory 30:

B. Maxwell

Sincerely yours,

Jennifer M. Euchner
Jennifer M. Euchner
Attorney

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,


Jennifer M. Eucher
Counsel for NRC Staff

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

Addendum to
TVA X 113

January 24, 2002

Brent R. Marquand, Esq. (E-mail and Regular Mail)
Tennessee Valley Authority
400 West Summit Hill Drive
Knoxville, Tennessee 37901-1401

SUBJECT: IN THE MATTER OF TENNESSEE VALLEY AUTHORITY (WATTS BAR
NUCLEAR PLANT, UNIT 1; SEQUOYAH NUCLEAR PLANT, UNITS 1 & 2;
BROWNS FERRY NUCLEAR PLANT, UNITS 1,2 &3)

Dear Mr. Marquand:

I am writing in response to your letter of January 22, 2002, in which you requested additional responses to Tennessee Valley Authority's (TVA) first set of interrogatories. The Staff has reviewed your request and objects on three grounds. First, the discovery period closed on December 31, 2001 and your letter constitutes an additional discovery filing which should have been filed during the discovery period. The Staff did not object when TVA filed its Request for Admissions and Interrogatories at 4:20 P.M. on December 31, 2001, and willingly provided responses to these last minute discovery requests. However, the Staff does object to providing responses to the current request, as it came three weeks after the close of discovery and could have reasonably been filed during the discovery period. Second, NRC regulations at 10 C.F.R. 2.740b(b) provide the Staff with 14 days to respond to an interrogatory request. Your letter of two days ago requests a response within two days, arguing that TVA needs this information in order to support TVA's anticipated motion for summary judgment. TVA cannot unilaterally compel the Staff to respond to an interrogatory request within a shorter period than the 14 days provided for by the regulations. In addition, the fact that the deadline for the summary judgment motion is fast approaching is the fault of TVA; this request could have been made to the Staff at the close of discovery. Third, the alleged basis for your late request, namely that Staff counsel asserted to the ASLB some new position about the Staff's basis for the violation, is inaccurate. The Staff has maintained the same position throughout the three prehearing conferences and all phases of this case. The Staff's position has not changed; TVA is simply refusing to acknowledge the irrelevance of the Office of Investigations conclusions to the issues in this case.

Without waiving these objections, the Staff recognizes that it has a duty to supplement discovery responses as it receives new information. Therefore, the Staff is willing to provide the following information related to your request of January 22, 2002.

Interrogatories 1, 2, and 3: The Staff has supplemented its September 4, 2001 and September 14, 2001 responses to these interrogatories in its January 22, 2002 response to TVA's second set of interrogatories, response to Interrogatory 2. In addition, the Staff identifies the following information related to Fiser's protected activities. On August 16, 1993, Fiser, William Jocher, and D. R. Matthews sent a letter to Senator James Sasser detailing their

involvement in protected activities which resulted in retaliation against them by TVA. For Fiser, the safety related concerns identified in that letter include: PASS equipment availability and design problems; emergency diesel generator seven day storage tank problems; unacceptably low process chemistry equipment availability; and the inability of chemistry technicians to meet the three hour requirement for drawing a coolant sample from PASS during an accident. For further detail on these protected activities, see the Sasser letter.

Interrogatory 4: The Staff has provided additional information related to its contention that it was "more likely than not" that McGrath was aware of Fiser's 1993 complaint in its response to Interrogatory 9 of TVA's second set of interrogatories.

Interrogatory 8: The Staff provided a response to this interrogatory in its September 4, 2001 response to Interrogatory 1(c) of TVA's First Set of Interrogatories.

Interrogatories 9, 18, and 21: The Staff has provided responses to these interrogatories in its response to Interrogatory 21 of TVA's second set of interrogatories.

Interrogatory 13: The Staff contends that BP 102, dated September 30, 1993, does not state that a selection review board must be used to conduct interviews during the selection process.

Interrogatory 26: The Staff has provided a response to this interrogatory in its responses to Interrogatories 4, 5, and 6 of TVA's second set of interrogatories.

I would also like to address two other outstanding issues. TVA presented two proposed stipulations for the Staff's consideration. The December 31, 2001 stipulation is identical to TVA's Request for Admissions and Interrogatory, filed on the same date. Since the Staff has provided responses and admissions to that request, the Staff sees no need to duplicate work by filing an identical Joint Stipulation. Therefore, the Staff declines to sign the proposed stipulation. The January 4, 2002 proposed stipulation involves procedural matters rather than factual matters. The purpose of admissions and stipulations is so that parties do not have to present evidence at the hearing to prove statements upon which they are in agreement. This stipulation would not result in reducing the amount of evidence required at the hearing because it does not address any of the factual matters at issue. Therefore, the Staff declines to sign the proposed stipulation.

In our phone conversation of January 23, 2002, you requested that I discuss with Mr. Dambly the Staff's position on a possible TVA motion for an extension of time to file a motion for summary judgment. The Staff will oppose any such motion for an extension of time. As stated during the January 9, 2002 prehearing conference, the Staff does not believe that this is an appropriate case for summary disposition because there are many areas of disputed material facts. Although the ASLB has provided TVA with an option for filing a motion for summary judgment, the Staff maintains that TVA could decline to file such a motion if it is unable to meet the deadline imposed by the Board. Additionally, an extension for the filing of such a motion would result in the extension of the date on which the Staff's response is due. This would make the Staff's response to the summary judgment due the same week as the prehearing brief. Having to file two substantive briefs in the same week would place an undue burden on the Staff, while placing no such burden on TVA. Finally, the Staff is concerned that an extension of the date on which the summary judgment motion is due could result in a delay of the hearing

date, since the ASLB will need additional time to address the motion. The Staff objects to any action which would result in the rescheduling of the hearing. In addition, TVA has maintained for many months now that it had overwhelming evidence mandating a grant of summary judgment in its favor. If that were the case, TVA could have drafted its motion long ago and should not need a last minute extension and late-filed discovery to complete its motion. For these reasons, should TVA decide to pursue a motion for an extension of time to file a motion for summary judgment, the Staff will oppose that motion.

Sincerely,

/RA/

Jennifer M. Euchner
Counsel for NRC Staff