

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE COMMISSION

June 17, 2004 (3:12PM)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

IN THE MATTER OF	)	Docket Nos. 50-390-CivP;
	)	50-327-CivP; 50-328-CivP;
TENNESSEE VALLEY AUTHORITY	)	50-259-CivP; 50-260-CivP;
	)	50-296-CivP
	)	
(Watts Bar Nuclear Plant, Unit 1;	)	
Sequoyah Nuclear Plant, Units 1 &	)	
2; Browns Ferry Nuclear Plant,	)	EA 99-234
Units 1, 2 & 3)	)	

TENNESSEE VALLEY AUTHORITY'S MOTION FOR LEAVE  
TO FILE SUPPLEMENTAL AUTHORITY

Pursuant to 10 C.F.R. § 2.730 and § 2.772 (2004), the Tennessee Valley Authority (TVA) moves for leave to file the attached citation of supplemental authority. As grounds for its motion, TVA would show (1) that the decision was not issued until after TVA filed its November 24, 2003, reply brief; (2) that the supplemental authority is directly pertinent to three of the central issues in this proceeding; (3) that since TVA has cited this authority without argument, consideration of the authority by the Commission will not delay this proceeding. The Commission has the authority pursuant to 10 C.F.R. § 2.772 (a), (c), and (k) (2004), to allow TVA to file its supplemental citation of authority, since accepting a new authority on matters already briefed (where there is good cause shown) is a minor procedural matter. This proceeding is analogous to an appeal for judicial review in which citation of supplemental authority is specifically

authorized by FED. R. APP. P. 28 (j) "Citation of Supplemental Authorities." Therefore, the Commission should grant TVA's motion and accept the attached supplemental citation of authority.

June 16, 2004

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I hereby certify that the foregoing document has been served on the persons listed below. Copies of the document have also been sent by e-mail to those persons listed below with e-mail addresses.

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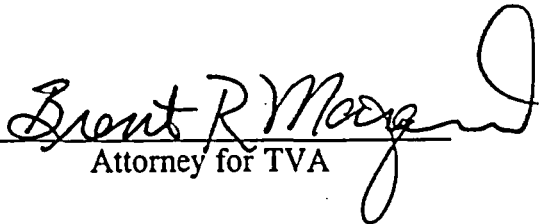
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This 16th day of June, 2004.

  
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**TENNESSEE VALLEY AUTHORITY'S CITATION  
OF SUPPLEMENTAL AUTHORITY**

The Tennessee Valley Authority (TVA) would like to call the Commission's attention to the following authority which has just recently been decided and come to our attention.

The United States Court of Appeals for the Second Circuit recently issued a *per curiam* decision in *Deters v. LaFuente*, 368 F.3d 185 (2004), affirming the position that we have taken on three points at issue in this proceeding. First, with respect to our argument that the Staff must prove a causal connection between Fiser's non-selection and his protected activity, the Court held that "plaintiffs must demonstrate that they suffered an adverse employment action which was causally connected to their pursuit of a state court action against defendants" and "must show that their maintenance of the state court action 'was a substantial motivating factor' in Knapp's decision not to approve their promotion, selection, or assignment" (368 F.3d at 189, 190). Second, as to our argument that there must be tangible proof of retaliatory motive, the Court held that plaintiffs "'may not rely on conclusory assertions of retaliatory motive, but must offer instead some tangible proof to demonstrate that their version of what occurred was not imaginary'" (368 F.3d at 190). Finally, we have argued that a retaliatory motive can not

be found here since Dr. McArthur accepted the selection choices of the Selection Review Board (SRB) and did not make a selection decision independent of the SRB's judgment. Similarly in *Deters*, the Court found that where the promotions, selections and assignments at issue were made by committees and defendant Knapp merely approved or disapproved of their choices, he was not shown to have exercised a retaliatory motive towards plaintiffs (368 F.3d at 190 and n. 6).

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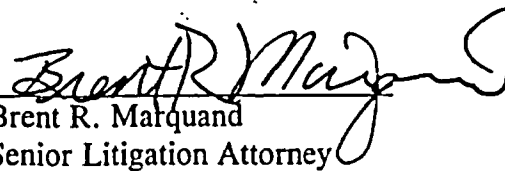
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