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FOIA 87-816
87-816

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November 17, 1987

FREEDOM OF INFORMATION
ACT REQUEST

FOIA 87-816
Rec'd 12-8-87

Chairman Lando W. Zech, Jr.
Commissioner Frederick M. Bernthal
Commissioner Thomas M. Roberts
Commissioner Kenneth M. Carr
Commissioner Kenneth C. Rogers
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

APPEAL OF INITIAL FOIA DECISION

87-816 (87-816)
Rec'd 12-8-87

Re: Tennessee Valley Authority
(Watts Bar Nuclear Plant,
Units 1 and 2)

Dear Chairman Zech and Commissioners:

On October 5, 1987, we filed with the Commission an Emergency Request seeking the Commission's prompt issuance of an Order requiring the immediate release by the Office of Investigations ("OI") of the OI Report that has been prepared on the accuracy of a March 20, 1986 letter from TVA to the NRC Staff concerning Watts Bar, as well as the supporting transcripts and documents. See Attachment 1. By letter dated October 9, 1987, our letter was referred to your Director of the Division of Rules and Records; on October 16, 1987, our Emergency Request was denied. See Attachments 2 and 3. ^{1/} We have decided to again raise this

^{1/} In a letter to Ms. Bauser dated October 9, 1987, Samuel Chilk, Secretary of the Commission, informed us that the request

(Continued Next Page)

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The sole basis asserted by the NRC to date for withholding the subject OI Report and supporting transcripts and documents is that they "are exempt from public disclosure under Exemption 7(A) of the FOIA because disclosure could reasonably be expected to interfere with an enforcement proceeding." NRC Staff letter of October 16, 1987. There has been no articulation and it appears that there has been no substantive consideration by the Commission or the NRC Staff of how the release of the information sought would in fact interfere with any ongoing enforcement proceeding.

For exemption 7(A) of the FOIA to apply, and documents to be withheld, the burden is on a federal agency to demonstrate that release of agency documents could reasonably be expected to interfere with the agency's enforcement function. See 5 U.S.C. Sections 552(a)(4)(B); 552(b)(7)(A). The Commission's denial letter falls far short of satisfying this standard. It fails to identify any potential deleterious impact that release of the Report and supporting documents would have on ongoing enforcement actions. We recognize that this matter has been referred to the Department of Justice ("DOJ"). But as our October 5th request made clear, the circumstances here do not lead to legitimate concerns by NRC or DOJ about tipping off targets, destruction of evidence, or other traditional rationales for nondisclosure of investigative records. Here, the investigative process is complete; extensive sworn testimony of the relevant players has been taken and preserved in transcript form (which clearly cannot be "tampered with"), and, in fact, some of these transcripts have been released to individuals interviewed. See note 6, *infra*. In such circumstances, the agency's ostensible interest in withholding the documents is negligible.

In addition to the considerations mentioned above, there is a strong public interest favoring disclosure of this report because of the public interest in TVA's nuclear program and the publicity which has surrounded this issue for over a year. Moreover, as we stated in our Emergency Request, the public interest in disclosure here is heightened by the fact that the apparent conclusions of the OI Director concerning the investigation have been made public. The OI Director's bald assertions (as reported in the press) not only disparage TVA and Admiral White but call into question the very program initiated by TVA and Admiral White (and praised by the NRC) to restructure and revitalize TVA's nuclear program. Without access to the Report and the supporting documentation, TVA and Admiral White cannot respond to the public questions concerning TVA's nuclear program raised by OI's

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apparent conclusions as reported by the press. It is only with access to these documents that TVA and Admiral White can provide the public and the NRC with a focused response to the disparaging OI conclusions found in public print.

Release of the documents is also strongly supported by Commission policy. In its Statement of Policy on Investigations, Inspections and Adjudicatory Proceedings, the Commission identifies two legitimate policy reasons for not disclosing OI or I&E investigatory records to the public: "(1) to avoid compromising an ongoing investigation; and (2) to protect confidential sources." 49 Fed. Reg. 36032-36033 (Sept. 13, 1984).^{3/} With regard to the first reason, avoiding compromise of an ongoing investigation or inspection, the Commission stated the following:

Release of investigative material to the subject of an investigation before the completion of the investigation could adversely affect the NRC's ability to complete that investigation fully and adequately. The subject, upon discovering what evidence the NRC had already acquired and the direction being taken by the NRC investigation, might attempt to alter or limit the direction or the nature or availability of further statements or evidence, and prevent NRC from learning the facts. * * * However, the need to protect information developed in investigations or inspections usually ends once the investigation or inspection is completed and evaluated for possible enforcement action.

49 Fed. Reg. at 36033. Here, the investigative process is complete. There is nothing that TVA or Admiral White could do, even under the unsupportable assumption that they so desired, to prevent the NRC from learning the facts, which are preserved in volumes of sworn testimony. The Director of OI also has made known his conclusions regarding the completed investigation. Thus

^{3/} The second reason has no application here, as was recognized in the October 16th letter. The October 16th letter did not cite as one of the reasons for nondisclosure FOIA Exemption 7(D) which exempts from disclosure documents that "could reasonably be expected to disclose the identity of a confidential source."

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there is no potential to prejudice either an investigation or any enforcement action. Given this disclosure, and the completion of a report, there are no legitimate reasons for not disclosing the report and underlying materials.

Furthermore, events subsequent to the filing of the October 5th Emergency Request make our request for the release of the OI report and its supporting documents even more compelling. We now understand that the OI Report and its underlying transcripts and documents have been provided to the regulatory Staff, including the Office of Special Projects ("OSP"), for consideration of their regulatory significance. Further, we have also just learned of public statements made by James Keppler, the director of OSP, that the issue of Admiral White's integrity "has to be resolved before the [Sequoyah] plant is restarted." See Attachment 4. This information adds an entirely new dimension to the urgency of TVA's October 5th Emergency Request. The undisclosed OI Report and associated transcripts and documents apparently will now be considered by OSP as a part of its recommendation to the Commissioners on whether authorization should be granted to restart TVA's Sequoyah plant. Any decision to delay or deny such authorization -- or a nondecision -- of course has an immensely serious and deleterious impact on TVA. And TVA plainly cannot respond to any regulatory concerns that OSP may have without timely access to the Report and the voluminous record associated with it. Traditional notions of fair play and justice require that this information be made promptly available to TVA so that it will have a reasonable opportunity to address the assertions in the OI Report now being reviewed by OSP. See, e.g., Old Dominion Dairy v. Secretary of Defense, 631 F.2d 953 (D.C. Cir. 1980).

Similar considerations of fairness are contained in the Commission's Statement of Policy on Investigations, Inspections and Adjudicatory Proceedings, supra. In its Statement of Policy, the Commission recognizes the need to balance between the agency's responsibility to disclose to affected parties (in that case, adjudicatory boards and litigants) all new information relevant to any matter at issue, and the need to protect investigative material from premature public disclosure. But where such materials are necessary for resolution of an issue (in that case, through the adjudicatory process), the Statement of Policy makes clear that the balance ordinarily weighs in favor of their release. Thus, "withholding [of] information [which] may prejudice one or more parties or jeopardize timely completion of the proceedings" is inappropriate. 49 Fed. Reg. at 36034. Likewise, information

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is to be disclosed to the affected parties where its "release will [not] prejudice the investigation." Id.

While the restart of Sequoyah does not involve an adjudicatory licensing proceeding, it is an analogous licensing matter pending before the Commission.^{4/} The statements of Mr. Keppler suggest that Admiral White's integrity, challenged by the OI report, is one of the issues to be considered by the Commission in this matter. As a holder of a license, TVA's vested interest in the release of critical NRC information relevant to pending Commission action on its license is even greater than that of a license applicant in an adjudicatory board proceeding. And certainly, as the Manager of Nuclear Power responsible for the Sequoyah plant, Admiral White's interest in resolution of this matter is compelling. In short, the principles of the Commission's Statement of Policy are equally applicable here. TVA and Admiral White will be prejudiced if the OI report and its supporting transcripts and documents are not released in time to provide them with a fair chance to address these materials.^{5/}

4/ The Commission and DOJ have separate responsibilities. Clearly they should cooperate to the extent that they can, but the fact that the investigative report has been referred to the DOJ does not relieve the Commission of its regulatory responsibility. The Commission now has before it the question of releasing OI's report, and the Commission in the near future will have before it the issue of Sequoyah restart. The Commission will have to decide on Sequoyah restart irrespective of DOJ's actions. Because of the extensive record of sworn testimony which has now been gathered from the investigation, there is no valid factual basis for concluding that release would interfere with the DOJ review. Accordingly, the Commission should release the report now.

5/ An immediate release is necessary to provide a fair chance to address this material. It appears that Sequoyah, Unit 2 may be ready to restart early next year. It also appears likely that OI's report, including the underlying documents, is voluminous and complex, and that it will take a substantial amount of time for TVA to assess and respond to this material. Postponing release, or the decision whether to release, until Sequoyah is ready to restart may not allow TVA a fair opportunity to respond and could result in this item becoming the pacing item for restart. Each day of delay could cost TVA and its ratepayers approximately \$400,000 for replacement power.

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And, for the reasons already stated, on the other side of the balance, no actual prejudice to the investigation or possible enforcement action will result from the release of the information sought.

The circumstances surrounding this matter thus call for prompt Commission action to release the documents now. For whatever reason, the process has become unfair and debilitating. The bald conclusory assertions regarding OI's investigation found in the public press have not only injured the good standing of TVA and the personal and professional reputation of Admiral White, but have also disparaged the many positive steps undertaken over the past two years to revitalize TVA's nuclear program. Those same assertions are now under regulatory review by OSP and may be asserted as a basis to deny timely NRC authorization for the restart of Sequoyah. It is impossible for TVA and Admiral White to squarely address these assertions in either the public or regulatory forums without access to the OI Report and the supporting transcripts and documentation. While the Commission cannot repair the damage to TVA and Admiral White that has already occurred, it can and should act to reduce the continuing nature of this debilitating damage by releasing the documents sought in order to enable TVA and Admiral White to promptly address the matter at hand.^{6/}

For the reasons set forth both in this letter and in the attached Emergency Request to the Commission dated October 5, 1987, we respectfully request on behalf of TVA and Admiral White that the Commission order the immediate release of the OI Report

^{6/} We emphasize that our request is directed to the underlying transcripts and documents as well as the Report itself. OI already has released some interview transcripts where witnesses were represented by counsel, who, as a condition of the interview, requested a copy of the OI transcript. OI also released at least three transcripts where witnesses were not represented by counsel. But OI has refused, at least in the near future, to release transcripts of other witnesses not represented by counsel, even where the witness subsequent to his interview has made a very specific written request for the transcript. There is absolutely no basis for this distinction and OI has cited none. As a policy matter, a witness should be entitled to a copy of his own statement, if, for no other reason, than to ensure the transcript's accuracy.

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concerning the March 20, 1986 Watts Bar letter as well as the supporting transcripts and documents.

Sincerely yours,

Deborah B. Bauser

Gerald Charnoff
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Tennessee Valley Authority

Enclosures

cc (w/encl.): Samuel J. Chilk, Secretary

MAN PICKS UT TO WIN BIG OVER CALIFORNIA. B1

OXVILLE

JRNAL

35¢
 Saturday
 October 3, 1967
 Knoxville, Tenn.
 Vol. 124
 No. 237

McKinney/McMahan Newspapers Final edition



George Bush

**No thanks
 over tanks**
 Bush's praise
 for Soviets bombs
 back in Detroit

NATION, A7

White faces Justice probe

NRC investigators conclude nuclear chief lied under oath

By KEVIN ELLIS

Susan Han Berlin

WASHINGTON — A federal investigation into whether Tennessee Valley Authority nuclear chief Steven White lied under oath about safety conditions at a TVA nuclear plant will be turned over to the Justice Department.

Two federal employees with knowledge of the Nuclear Regulatory Commission probe say the NRC's investigators concluded that White intentionally misled the commission.

The director of the NRC's Office of Investigations has decided to refer the case to the Justice Department,

according to the sources. The investigations director, Ben Hayes, told the five-member NRC Thursday and congressional committee staffers Friday that he had concluded that White misled the commission, according to the sources.

The probe now turns to the Justice Department, which has several options. It could decide not to investigate; it could investigate further and drop the case; or it could investigate and seek a criminal indictment.

The NRC has been investigating White's March 28, 1966, statement that one of TVA's nuclear plants complied with federal safety regu-

lations. Hayes and an NRC spokesman declined comment on the investigation and on the findings of the NRC and the staffs of two congressional subcommittees with jurisdiction over nuclear power.

White could not be reached Friday.

But TVA spokesman Calvin Crowell issued a prepared statement saying TVA officials are outraged because White has not been told of the results of the investigation.

"We are outraged about this whole controversy and the way it is being handled," Crowell said. "This investigation is being funded by oth-

ers who have their own purposes." Crowell could not identify whom he meant.

The controversy centers on White's response to NRC questions about safety at TVA's Watts Bar nuclear plant in Spring City.

On Jan. 2, 1968, the NRC requested that White state under oath the agency's position on whether the Watts Bar nuclear plant met certain federal safety regulations regarding the plant's cooling program, electrical cables and other parts of the operation.

See TVA, Page A8

Environment official named, A9

MISSISSIPPI VS. CALIFORNIA



By The Knoxville Journal

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SAT OCT 3, 1987

Knoxville Journal

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TVA

From Page A1

On March 20, White replied that "I find that there has been no persuasive breakdown of the quality assurance program at Watts Bar." White went on to say that the "overall q.a. (quality assurance) program is in compliance with" the regulations.

On May 18, the NRC informed White that it didn't accept his response, and it directed the Office of Investigations to begin its inquiry into whether White intentionally misled the NRC.

Tennessee Reps. Mardyn Lloyd, a Democrat, and John Duncan, a Republican, whose districts include many TVA facilities, have not been briefed on the conclusions of the NRC probe.

Aides to Tennessee Rep. Jim Cooper, a Democrat, were invited to a briefing, but they stayed away after they informed committee staffers that they would tell White and reporters what they learned at the briefing. Cooper's staffers were the only ones from a Tennessee representative invited to the briefing.

Cooper, reached in Atlanta, Ga., said he is concerned about the conclusions of the investigation and suggested the NRC may be taking it upon itself to work its own line of investigation that found White had done nothing wrong.

"I am very concerned about the charges, but I think White is entitled to a formal presentation instead of this," Cooper said. "We don't know whether they are just



STEVEN A. WHITE: accused of lying to NRC investigators.

passing the buck and looking to cover (the NRC's) rear end."

Cooper has long contended that White should be excused for possibly making false statements about Watts Bar because he had been in his TVA job only three weeks.

Crowell said it is unfair that White has not had a chance to confront the conclusions reached by NRC.

"We have not been briefed on this report," Crowell said. "This attack on Steve White is being conducted behind closed doors without an opportunity for Mr. White to answer his answers. This is unfair on the face of it. Any time information is being controlled, you always suspect ulterior purposes."

THE TENNESSEAN

A GANNETT NEWSPAPER

Nashville, Tennessee

Probe of TVA chief to spread

KEVIN ELLIS

General News Service

WASHINGTON — A federal investigation into whether TVA's nuclear chief Steve White lied under oath about safety conditions at a TVA nuclear plant will be turned over to the Justice Department.

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NRC reportedly concludes TVA chief misled panel

BY KEVIN ELLIS

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On March 20, White replied that "I find that there has been no pervasive breakdown of the quality assurance program" at Watts Bar. White went on to say that the "overall QA quality assurance program is in compliance with the regulations."

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White, a former Navy admiral, was hired to rebuild TVA's nuclear program. All five of the TVA's nuclear reactors have been closed because of safety problems. □



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