

October 5, 1987

BEFORE THE
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
TENNESSEE VALLEY AUTHORITY)
(Watts Bar Nuclear Plant,)
Units 1 and 2))
)

TVA EMERGENCY REQUEST FOR ORDER RELEASING
OI REPORT AND UNDERLYING TRANSCRIPTS AND DOCUMENTS

The Tennessee Valley Authority ("TVA") is the owner and constructor of the Watts Bar Nuclear Plant. TVA respectfully requests that the Commissioners of the Nuclear Regulatory Commission ("NRC" or "Commission"), pursuant to 10 C.F.R. §2.790(e), promptly issue an Order requiring the immediate release by its 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 all supporting transcripts and documents.

TVA's request is based on the fact that the NRC's actions, apparently through its Director of OI, have already resulted in the public release of at least the OI Director's conclusions, presumably based on the information in the subject Report. There is no compelling reason for continued nondisclosure. In the absence of such a "compelling reason," the Commission has the responsibility to make available to TVA the Report

and the transcripts and documents associated with it. 10 C.F.R. §2.790(a). The public interest in the integrity of NRC's investigative process dictates this action. Certainly, under the applicable "balancing of interests" test, TVA should be provided with this information.

I. BACKGROUND

Over the past year, OI conducted an extensive investigation into the accuracy of TVA's March 20, 1986 letter to the NRC Staff which reported on allegations concerning Appendix B matters at Watts Bar. That letter was signed by retired Admiral Steven A. White, the Manager of Nuclear Power for TVA. Admiral White joined TVA in January of 1986 to lead the effort to revamp TVA's nuclear program. At the time of Admiral White's arrival, all five of TVA's operating nuclear power plants were shut down. Over the past year and a half, Admiral White has dramatically reorganized and restructured TVA's nuclear program, and has revitalized the program, both by the influx of many new, well-qualified personnel, and by changes in policies and procedures at TVA. Today, Admiral White is in the midst of instituting these changes.^{1/} By any standard, Admiral White's

^{1/} The NRC Staff has remarked very favorably on the changes Admiral White is instituting at TVA. In an August 6, 1987 briefing of the NRC Advisory Committee on Reactor Safeguards, James G. Keppler, Director, Office of Special Projects, stated that, "The change at TVA . . . is radical and

(Continued Next Page)

task has been monumental. It has required and continues to require his undivided attention.

TVA generally, and Admiral White specifically, cooperated fully with the OI investigation of the March 20, 1986 letter. Many TVA employees were interviewed by OI, some repeatedly. Numerous contractor employees also were interviewed. Admiral White himself was interviewed on three separate days. In all of these activities, as well as others, it has been TVA's and Admiral White's intent to fully support NRC in the conduct of its activities and specifically, to be fully responsive to the investigators' needs in conducting a thorough and professional investigation of the March 20, 1986 letter.

The responsibility TVA has exercised in its participation in this investigation should be matched by the NRC in its activities. OI investigations must be conducted professionally and responsibly. The public must have confidence in the integrity of the process; licensees and their employees must as well. OI investigations of alleged wrongdoing have a legitimate purpose. The public disclosure of NRC investigations, as here, with no disclosure to the licensee or opportunity for comment, has the

(Continued)

effective [I]f they continue with the programs they have committed to, I don't see any reason why the TVA project cannot be an outstanding performing project." ACES Mtg. Transcript at 22-23 (Aug. 6, 1987).

potential for preventing a licensee from being able to effectively manage its program. No one would argue that it would be in the public interest for NRC's investigations to become a means by which those who can exert influence and choose to do so, use the process to paralyze a licensee and its management. Similarly, no one would argue that permitting the OI Director's conclusions to be published without the underlying findings, with consequent injury to the reputations of individuals, neither serves the public interest nor the integrity of the agency. In fact, that is what is happening here.

Pursuant to its agreement with TVA counsel and counsel for certain TVA contractor employees, OI has released certain key witness interview transcripts, including Admiral White's transcripts. As agreed, this release occurred about one week after the completion of OI's investigative field work, some three weeks ago. This release marked the end of the investigative stage of the OI process.^{2/}

^{2/} OI has not released other witness transcripts, however, asserting that where individuals were not represented by counsel who asked for the transcript during the interview, no transcript would be forthcoming, at least in the near future. This approach has been applied even in those cases where an individual subsequent to his interview made a very specific request for his transcript.

To the best of TVA's knowledge, in this case, OI briefed the Commissioners on the status of the subject investigation on Thursday, October 1, 1987. That closed briefing was facilitated by an extensive OI Report which, presumably, details OI's findings. To the best of TVA's knowledge, the OI Report itself has not yet been publicly released.

On Friday, October 2, 1987, the Director of OI also briefed staff members of the House Committee on Energy & Commerce, Subcommittee on Oversight & Investigations and perhaps other Congressional Committees. These briefings have resulted in the publication in the press of articles charging, among other things, that "NRC investigators conclude nuclear chief lied under oath," and "White intentionally misled the [C]ommission." See Attachments 1 and 2.

OI has not informed Admiral White or anyone else from TVA about the charges attributed to the Director of OI that were made against Admiral White and TVA. The basis for these accusations therefore remains hidden, and Admiral White and TVA are in the untenable position of being unable to respond to publicly-aired accusations. At the same time, Admiral White and others in TVA must continue to try to function effectively, to retain the public's confidence, and to give the nuclear program their undivided support and attention.

In these circumstances the facts may not dictate the resolution of this matter; rather, the manner in which the process is being conducted may be determining the ultimate outcome, independent of the facts. The Commission has the authority and, we suggest, in the public interest, it has the responsibility to put the system back on track. It should do so promptly.

II. BASIS FOR RELIEF

NRC regulations require that final NRC records and documents must be released to the public "in the absence of a compelling reason for nondisclosure." 10 C.F.R. 2.790(a).^{3/}

OI has finished its field work, as evidenced by its release of some transcripts, and has completed a Report. Certainly, the "investigative" part of its effort is over. And since the Director of OI briefed Congressional staff members and the Commissioners on the basis of the OI Report that has been prepared, even if other reports may at some time be generated, the OI Report in question constitutes a final report within the scope

3/ "Section 2.790 of the rules of practice is the NRC's promulgation in obedience to the Freedom of Information Act, (FOIA), 5 U.S.C. 552." Consumers Power Co. (Palisades Nuclear Power Facility), ALJ-80-1, 12 N.R.C. 117, 120 (1980). The FOIA is "a broad disclosure statute which evidences a 'strong public policy in favor of public access to information in the possession of federal agencies.'" Cochran v. United States, 770 F.2d 949, 954 (11th Cir. 1985), citing Brown v. Federal Bureau of Investigation, 653 F.2d 71, 73 (2d Cir. 1981).

of 10 C.F.R. §2.790.^{4/} The unreleased transcripts and documents also are final documents:

Unquestionably, the burden is on the party seeking to prevent the disclosure of NRC records and documents to establish a legal basis for doing so. 10 C.F.R. §2.790(a); see Cochran v. United States, 770 F.2d 949, 954 (11th Cir. 1985); Environmental Protection Agency v. Mink, 410 U.S. 73, 80 (1973). The test set forth in the regulation for determining whether nondisclosure is permissible is "a balancing of the interests of the person or agency urging nondisclosure and the public interest in disclosure." 10 C.F.R. §2.790(a).

To the extent any basis for nondisclosure has been articulated, and to date at least publicly there has been none (other than the suggestion that interviewees without the benefit of counsel may not review their transcripts), the rationale of protecting the integrity of its investigation or any related

^{4/} In a FOIA exemption 5 case, involving the requested disclosure of an intra-agency document, the district court (citing the D.C. Circuit Court of Appeals) noted that even if a document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on the issue and is used by the agency in its dealings with the public. Washington Post Co. v. U.S. Dept. of Air Force, 617 F. Supp. 602, 605 (D.C.D.C. 1985). In the present case, the Director of OI apparently was prepared to adopt a formal position on this matter, relying on the subject OI Report and underlying transcripts and documents. It would therefore be disingenuous still to argue that the documents in question continue to be predecisional.

enforcement proceeding no longer is compelling.^{5/} The investigative process is complete; a number of transcripts are now public. If OI were to suggest a concern about tipping off "targets", destruction of evidence, or any other traditional investigative rationale for nondisclosure, the fact is that this case is no longer in a posture where these nefarious activities could be accomplished, even if somebody had wanted to do so. The evidence is in; there is nothing to tamper with. In any event, there is absolutely no basis for claiming that any such improper activities might be undertaken. Such hypothetical arguments fall far short of the compelling basis for nondisclosure which is required in the context of investigatory exemptions to FOIA requests, on which the § 2.790(a)(7) standard is based. Marzen v. U.S. Dept. of Health and Human Services, 632 F. Supp. 785, 805 (N.D. Ill. 1986) (under exemption 7(a), government

^{5/} 10 C.F.R. Section 2.790(a)(7) exempts from disclosure "investigatory records compiled for law enforcement purposes," but only to the extent that the production of such records would (i) interfere with enforcement proceedings, (ii) deprive a person of a right to a fair trial or an impartial adjudication, (iii) constitute an unwarranted invasion of personal privacy, (iv) disclose the identity of a confidential source ..., (v) disclose investigative techniques and procedures, or (vi) endanger the life or physical safety of law enforcement personnel. 10 C.F.R. § 2.790(a)(7). TVA believes exemptions (iii), (iv), (v) and (vi) are inapplicable to this case. If anything, exemption (ii) weighs heavily in favor of disclosure; the process OI has used is grossly unfair to TVA and Admiral White. That leaves exemption (i) which, TVA has assumed in the text of this Request, is the only exemption OI could even attempt to put forward in arguing against disclosure.

agency must demonstrate "concrete, cognizable, and substantial interference" with enforcement proceedings); see n.3, supra.

Compounding the weakness in any argument favoring non-disclosure is the indisputable fact, see Attachments 1 and 2, that whether through any deliberate intent or not, information about this investigation already has been released or leaked to the public. Of course, TVA does not know exactly what information has been released. At this time, all we know is that the OI Director's thoughts on the matter have been published in the newspaper. To argue that the release of the bases for these conclusions might jeopardize some investigative purpose is to fail to take responsibility for the release of information that OI voluntarily risked when it chose to discuss the report outside the NRC.

Balancing any theoretical investigatory rationale against the real and continuing injury to TVA and Admiral White caused by nondisclosure of the OI Report and associated transcripts and documents unquestionably leads to the conclusion that these documents should be released by the Commission now. For whatever reason, the process NRC has employed has become intolerably unfair and debilitating. The release of bald accusations in the press, which are impossible to rebut or defend against, injures the good standing of TVA in the community and the personal and professional reputation of Admiral White. This

is no slap on the hand; at a minimum, the OI Director's views challenge the integrity of the man responsible for TVA's nuclear program. This was done without affording Admiral White or TVA any opportunity, and certainly not a timely one, to challenge their accuser.^{6/} It would be an abuse of process for OI to hide behind an "investigative" protection argument to obstruct scrutiny of the bases for the OI Director's conclusion. Meetings which risk and then result in such injurious consequences cannot and should not be sanctioned by the NRC. To allow this situation to continue indefinitely constitutes such a sanctioning.

III. CONCLUSION

The Commission cannot repair the damage to TVA's standing and Admiral White's reputation that already has occurred from the public disclosure of the Director of OI's views about the March 20, 1986 letter. But the Commission can and should reduce the continuing nature of this debilitating damage by giving TVA and Admiral White a prompt opportunity to address the matter at hand. Affording that opportunity a year from now, or even two weeks from now, will be too late to overcome the adverse impact of the disclosure that has occurred. And it is simply impossible

^{6/} Just as it "would be grossly unfair to permit records to be available to unauthorized third parties and at the same time deny access to the FOIA requester," Figura v. Higgins, 572 F. Supp. 1093, 1100 (D.N.H. 1983), so, too, would it be grossly unfair to allow the OI process to precipitate public defamatory remarks against a licensee without providing the accused the information on which those remarks are based.

to squarely address the matter at hand without knowing the basis for the OI Director's conclusion. TVA and Admiral White's interests in obtaining access to this information far outweigh any ostensible argument, grounded on theory and not fact, for continued nondisclosure of the subject OI Report and the transcripts and documents on which it relies.

For the reasons stated in this Request, TVA asks the Commissioners for the immediate release of the OI Report on which the OI Director's conclusions, reflected in Attachments 1 and 2, are based, as well as all underlying OI interview transcripts and documents.

Respectfully submitted,

Deborah B. Bauser

Gerald Charnoff
Deborah B. Bauser

SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 822-8215

Counsel for TVA and Admiral
Steven A. White

James E. Fox,
Deputy General Counsel
Tennessee Valley Authority

Dated: October 5, 1987