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May 20, 1988

BY HAND DELIVERY

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

Dear Chairman Zech and Commissioners:

On October 5, 1987, the Chairman of the Tennessee Valley Authority (TVA), Charles H. Dean, Jr., wrote to you regarding newspaper reports that the NRC's Office of Investigations (OI) had concluded in a report unavailable to TVA or TVA's Manager of Nuclear Power, Admiral Steven A. White, that Admiral White had made willful material false statements in TVA's March 20, 1986 letter to the NRC regarding 10 C.F.R. Part 50 Appendix B compliance at the Watts Bar Nuclear Plant. Chairman Dean expressed serious concern about the basic unfairness of a process of publicly attacking Admiral White without providing him any opportunity to respond, a process under which, as Chairman Dean stated, "TVA may be the only interested party that has not received the benefit of a briefing by the NRC staff." Chairman Dean also noted that "if the press coverage is anywhere near accurate, we do not understand how OI could have arrived at the conclusions reported."

We recognize that you neither authorized nor condone this unprecedented and unjust process. Nonetheless, it has continued unabated, including in a hearing before the House Subcommittee on Oversight and Investigations on April 21, 1988. Perhaps in

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recognition of the extreme unfairness of this process, several individuals have offered TVA a copy of the widely-disseminated unsigned OI Report on the Appendix B matter.

After reviewing that Report, it is apparent that any reasonable person would find that OI's conclusions are unfounded. Not only does the evidence convincingly establish that there was no intent by TVA or Admiral White to mislead or to falsify, but our review of the facts continues to confirm that neither Admiral White nor TVA made a material false statement to the NRC in the March 20 or June 5, 1986 letters. Furthermore, Admiral White clearly did not lie to the OI investigators, as OI wrongly alleges in its Report.

We understand from your testimony at the April 21, 1988 House Subcommittee hearing that the NRC is considering initiating some form of enforcement action against TVA as a result of its investigation into this matter. It is apparent from a review of the OI Report and a number of the transcripts and documents on which it relies that enforcement action in this case is neither warranted nor appropriate.

The purpose of this letter is to demonstrate that there is no basis for taking any enforcement action in this case. We cannot address the entire record, as it has not been made available to us. Nevertheless, we believe that our summary comments on the OI Report (Attachment A), along with our more detailed legal comments on that Report (Attachment B), establish the accuracy and reasonableness of TVA and Admiral White's March 20 and June 5, 1986 letters, as well as the honesty and reasonableness of Mr. White's testimony during the OI investigation.

Each of the detailed legal comments contained in Attachment B and summarized in Attachment A establish that no reliance can be placed on the OI Report. It is fundamentally flawed in the following respects and should be set aside:

1. OI fails to demonstrate that Admiral White's testimony was dishonest;

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2. OI makes unsubstantiated and erroneous characterizations;
3. OI makes material omissions and consequent misrepresentations of the record;
4. OI fails to consider highly material evidence;
5. OI materially distorts the record by taking statements out of context; and
6. OI attributes knowledge and wrongdoing to Admiral White without any showing of his knowledge or intent.

Based on the extreme selectivity and misrepresentation shown by OI in its use of those portions of the record with which we are familiar, the reasonable inference is that a detailed review of the remaining materials that are unavailable to us would reveal many more instances of selectivity, bias and error.^{1/}

In short, the OI Report is a totally unreliable document because it is inaccurate, misleading, materially incomplete, and appears to support a preconceived position. The process which led to publication of these adverse and erroneous conclusions against an individual with an impeccable record of achievement, public service, and integrity is patently unfair. Admiral White, TVA, and the NRC deserve much better than what has been delivered here.

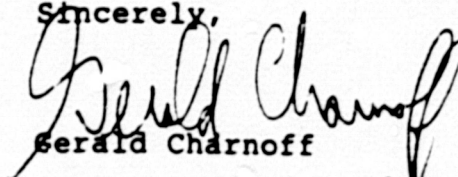
It is not possible to rectify the injustice that already has been caused by continuous publication of OI's unsupported charges against the integrity and reputation of Admiral White and TVA. However, it is possible to prevent any further injustice. At some point, what is right and what is fair ought to control the outcome of an NRC inquiry such as this. We are hopeful that the

^{1/} In Attachments A and C to this letter, we bring to the Commission's attention several serious errors in OI testimony on this matter which further confirm our concerns about the selectivity and misrepresentation of the record in this case.

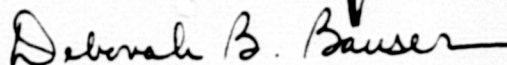
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information submitted will encourage you to put an end quickly to this deplorable episode and to conclude that no enforcement action should be initiated against TVA or Admiral White.

Sincerely,



Gerald Charnoff



Deborah B. Bauser

Deborah B. Bauser

Attachments
cc (w/Attachments):

W. Parler
General Counsel
U.S. Nuclear Regulatory Commission

S. Chilk
Secretary
U.S. Nuclear Regulatory Commission

V. Stello
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U.S. Department of Justice

ATTACHMENT A

SUMMARY OF DETAILED LEGAL COMMENTS
IN ATTACHMENT B AND DISCUSSION
OF OI TESTIMONY IN ATTACHMENT C .

SUMMARY OF DETAILED LEGAL COMMENTS
IN ATTACHMENT B AND DISCUSSION
OF OI TESTIMONY IN ATTACHMENT C

The detailed legal comments in Attachment B demonstrate that there were not, as OI alleges, any material false statements in TVA's March 20 or June 5, 1986 letters, and that Admiral White did not lie to the OI investigators. To the contrary, as set forth in Attachment B, which contains illustrative rather than exhaustive comments, there are at least six fundamental flaws in the OI Report that demonstrate that the report is biased and materially incorrect and that it cannot be relied on for any purpose. The following is a summary of each of the six flaws discussed in Attachment B. Further details, citations and supporting information for these comments are contained in Attachment B. In addition, Attachment C discusses several serious misstatements in OI testimony both to the Commission and to Congress on this matter which further confirm our concern about the selectivity and misrepresentation of the record in this case. Those misstatements were disclosed by a very limited review of OI testimony on the Appendix B matter. Attachment C is briefly summarized below after the summary of Attachment B.

Summary of Attachment B

First, OI fails to demonstrate that Admiral White was dishonest in his testimony to the OI investigators. OI concludes in its Report that Admiral White lied in four instances. However, an examination of the Report shows that OI's conclusion is based primarily on leaps of logic which simply are not supported by the record. Two of the alleged lies involve Admiral White's recollections of phone conversations with NRC Commissioner Asselstine and Hugh Thompson, an NRC official. In each case, Admiral White described his recollection of the calls, and neither Commissioner Asselstine nor Mr. Thompson remembers their respective calls. OI does not discuss the circumstantial evidence that supports Admiral White's memory. For instance, telephone company computerized records for TVA substantiate that Admiral White had about a 15 minute conversation with Commissioner Asselstine on March 19. It is hard to imagine that they would not have discussed the letter the day before it was sent, particularly in view of Commissioner Asselstine's focus on the matter during a Commission meeting one week earlier.

OI also ignores the telephone company records and contemporaneous notes of Mr. White's conversation with Mr. Thompson. OI's report on these conversations stands in marked contrast to a recent report by the Government Accounting Office (GAO) into

several internal NRC investigations, including one involving matters relating to telephone calls between Admiral White and senior NRC officials. That report recognized the credence to be given to Admiral White's contemporaneous notes.

It is worth noting in this regard that Mr. Denton in his first two OI interviews did not give any indication that he had discussed the March 20 letter with Admiral White, but in his third interview he did not challenge Admiral White's description of their conversation. Additionally, the subsequent GAO Report noted that the accounts of Victor Stello and Harold Denton, both senior NRC officials, regarding other phone calls on March 20 with Admiral White about the March 20 letter coincided with Admiral White's memory. Nonetheless, OI concludes, largely based on a lack of memory by the NRC officials, that the conversations with Messrs. Asselstine and Thompson as described by Admiral White never took place and that Admiral White made the conversations up. To say the least, it stretches credibility to believe Admiral White fabricated these two conversations, and yet was able to provide telephone company records and notes of his conversation with Mr. Thompson as well as telephone company records of his conversation with Commissioner Asselstine.

With regard to the other two alleged lies in Admiral White's testimony, OI in both cases ignores significant evidence and mischaracterizes the issue and the testimony of witnesses. One alleged lie involves the meaning of the word "pervasive," and when the definition of that word was discussed. OI states that the then-Director of Quality Assurance (QA) at TVA, Mr. Richard Kelly, discussed a dictionary definition of "extending into all parts" with Admiral White about February 20, 1986, and that was the meaning of pervasive when it was used in the March 20 letter. Mr. White, on the other hand, remembers this discussion as occurring in May, 1986, and states that on March 20 he intended to use the definition of pervasive as set out in NRC adjudicatory decisions.

Regardless of when the discussion of the dictionary definition of pervasive took place, OI fails to mention testimony by the individuals involved that they believed the two definitions were fundamentally the same, and, regardless, that they did not believe the situation was anywhere close to a pervasive breakdown. Instead, OI takes testimony out of context to try to make this issue significant. For instance, OI states that Mr. Kelly would not have agreed with the March 20 letter if it had said widespread or significant breakdown, instead of pervasive breakdown. This implies that Mr. Kelly thought that there was a widespread or significant breakdown. OI's characterization is misleading. For example, OI does not add that Mr. Kelly testified that he would not have used the term "widespread" not because he felt there was a widespread breakdown, but because the word was

too subjective and open to interpretation. In other words, the difference, if there was one, was only one of semantics, not of substance.

OI also fails to consider or mischaracterize substantial evidence that supports Admiral White's recollection of when the definition of pervasive was discussed and what the intended meaning was on March 20. For instance, OI cites testimony by the then-Deputy Director of QA at TVA as supporting Mr. Kelly's statement that only the dictionary definition was discussed with Admiral White prior to March 20. OI fails to note that that testimony actually indicates that both definitions were discussed prior to March 20, and hence supports Admiral White's statement that he intended the NRC adjudicatory meaning of pervasive on March 20.

The other alleged lie in Admiral White's testimony involves the statement in the June 5, 1986 letter concerning the review by the two non-TVA groups. The June 5 letter stated that a group of outside individuals reviewed each of the NSRS perceptions, and a group of highly experienced non-TVA experts reviewed this group's findings. OI concludes that Admiral White lied when he discussed his understanding of what the second group did. Admiral White's testimony explained that in reviewing the technical responses which were attached to the March 20 letter he talked to his senior advisors and loaned managers to find out whether they understood the facts, whether the facts supported the conclusions, and whether the facts and conclusions supported the basic letter.

OI claims that Admiral White's senior advisors did not characterize their role as a review of the first group's findings. OI misses the point. Admiral White testified that he did not separate the line responses and the first group's review. OI's claim does not mean that Admiral White's advisors and loaned managers did not review the line responses, which the first group's review in effect endorsed. For example, testimony by Mr. Kelly, who was the individual interfacing directly with Admiral White on the progress of the March 20 response, supports Admiral White's understanding of this second group. In short, Admiral White understood that a variety of his senior advisors and loaned managers reviewed the end-product of the line organization and the first review group, namely the attachments to the March 20 letter. OI ignores Admiral White's testimony and supporting evidence which shows that while there was not a formally designated "group" or formal "findings," nonetheless there was a review by highly experienced non-TVA individuals. An objective review of the evidence shows that OI's conclusion that Admiral White lied is unsupported and incorrect.

Second, OI has made unsubstantiated and incorrect characterizations in its Report. OI states that TVA "obfuscated" the

March 20 letter through the use of "unreasonably defined terms and limitations." OI focuses on four phases to support this charge. As detailed in Attachment B, OI's conclusion in each case is unsupported and incorrect. For the sake of brevity, this summary will focus on the two phrases that, in OI's words, represent "subtle but significant changes." While OI apparently would impugn TVA for these "subtle" changes, in fact those changes made the March 20 letter more accurate. The first phrase, "Based on a review of the NSRS perceptions," was changed to "Based on a review of the issues identified in the NSRS perceptions." Testimony shows that this phrase was understood by TVA to mean that TVA's conclusions were based on the "bases" for the NSRS perceptions, rather than on the broad perceptions themselves, and that this is an accurate statement. Nonetheless, OI, without analysis or supporting evidence, draws the remarkable conclusion that "White and his advisors knew that the extent of the 'review' was much more limited than would be envisioned by the NRC readers of that phrase."

The other phrase which OI characterizes as a "subtle but significant change" was from "the program has identified problems" to "problems have been identified." Since problems had been identified through avenues other than the QA program, the change is a more precise statement, but OI again without any evidence leaps to the extraordinary conclusion that "TVA consciously avoided saying that the QA program had identified problems." In sum, OI seems to be reading ulterior motives into not only perfectly innocent, but more precise, language.

Third, OI has made material omissions and consequent misrepresentations of the record. The Attachment lists numerous examples -- like the above discussion of the testimony of the Director of QA regarding why he would not have substituted "widespread" for "pervasive" -- where the OI Report is either severely incomplete or contains a biased presentation of the facts which is designed to impugn TVA and Admiral White. For example, OI critically states that senior TVA managers were not involved in writing the final March 20 letter. OI fails to point out that Admiral White testified that he deliberately relied on outsiders because he wanted people with no ax to grind and no preconceived notions in order to assure an independent and unbiased response. As an example of OI's numerous mischaracterizations of the record, OI states that Robert Mullin, former TVA manager of QA, "stated that TVA adopted the stance that they were in compliance with Appendix B until proven otherwise." Mr. Mullin's testimony does not even remotely resemble this characterization. Rather, he felt it was necessary to show effective implementation of the program in order to be in compliance with Appendix B. Similarly, OI attempts to impugn TVA for writing a "strategic response" as if this were a venal posture. OI fails to note that the cited testimony actually indicates that the strategic nature of the

response was for Admiral White to commit to keep looking for problems and to report and fix them when they were found. OI also criticizes Admiral White because the Director of NSRS limited his concurrence and because the NSRS staff was not afforded an opportunity to review the March 20 letter prior to its submittal. OI conveniently fails to note that Admiral White learned of the qualification on this individual's concurrence substantially after the March 20 letter was sent, and that there is evidence which in fact shows that the final draft of the letter was provided to the Director of NSRS for comment. In sum, the OI Report makes statement after statement that leads the reader constantly to question TVA's motives and actions, when in fact a fair presentation of the evidence would show that TVA's motives were not only entirely innocent, but designed to find and tell the truth.

Fourth, OI has failed to consider highly material evidence, which is illustrative of the apparent intent of the Report to support a preconceived position. OI assumed without question that a material false statement had been committed, and that it could ignore any evidence to the contrary. For example, TVA provided OI with affidavits from three former senior NRC managers who held positions with significant oversight responsibility for TVA in the time frame in question. Those affidavits contained the views of those managers that the March 20 letter did not contain a material false statement. They also bear directly on the reasonableness of some of the testimony regarding the intent and meaning of the March 20 letter. One of those affidavits also shows that the Director of OI, Mr. Hayes, was personally involved in and well aware of the ongoing NRC staff discussions regarding the March 20 letter and what compliance with Appendix B meant, and by inference that he knew that at least those three individuals did not believe there was a material false statement. That affidavit also shows that Mr. Hayes and other NRC officials were receiving frequent phone calls from a Congressional staff member with allegations regarding TVA's nuclear program, and that the NRC staff felt continuing pressure and was concerned about being subject to Congressional criticism. In spite of the relevance of these affidavits, OI did not interview these three individuals. Further OI only makes passing mention of those affidavits and deliberately ignores the information contained in them. OI's failure to consider those affidavits, by itself, completely undermines the factual basis for any conclusion of wrongdoing.

Fifth, OI has materially distorted the record by taking statements out of context. For example, OI focuses on one sentence in the March 20 letter and ignores the rest of the letter. While that one sentence presented TVA's position on compliance with Appendix B, the rest of the letter discussed the ongoing nature of TVA's review and necessarily made the sentence focused on by OI tentative. The only time OI mentions the rest of the

letter is when it refers to other portions of the letter to facilitate an implied charge that the acknowledgement of problems with the corrective action program in the March 20 letter was inconsistent with the basic position taken in the letter. But this acknowledgement was an integral and material part of the basic position taken in the letter. OI simply cannot have it both ways.

Sixth, OI attributes knowledge and wrongdoing to Admiral White without any showing of his knowledge or intent. The OI Report concludes that Admiral White knowingly and willfully submitted material false statements. When NRC brings such charges, it would be appropriate and fair to show that the individual knew that the alleged false statements were untrue. However, the OI Report is, at best, a potpourri of background materials, selective quotations and, primarily, paraphrases from certain interviews. Nowhere is there a clean delineation of what Admiral White presumably knew or understood, as opposed to what others may have known. For example, OI attributes to Admiral White knowledge of quality related problems apparently identified in November 1985 during a two-week assessment by a team of non-TVA consultants. This assumption of knowledge flies in the face of the record as we know it. Even if the biased presentation of facts presented by OI were accepted, OI has not shown that Admiral White knew of information which made any of the statements false. Obviously such knowledge is essential to any showing that Admiral White knowingly and willfully made a material false statement.

Summary of Attachment C

Our review of a March 1, 1988 Commission meeting transcript on the subject of the OI investigation on the Appendix B matter indicates that one of the OI investigators, with the apparent knowledge of the Director of OI, provided a false account to the Commission. In particular, OI testified that an attorney for a witness was not his personal attorney, when in fact the transcribed interview shows unequivocally that she was.

OI also misrepresented the facts in this case in March 21, 1988 testimony before the House Subcommittee on Oversight and Investigations. Testimony by an OI investigator and an OI technical assistant was incorrect and misleading, as explained in more detail in Attachment C.

Conclusion

In conclusion, a review of the OI Report and related material shows that OI began this investigation with the assumption that there were material false statements. OI refused to take into consideration evidence to the contrary. Instead, OI

produced a Report which reflects an inaccurate, misleading and materially incomplete review and presentation of the evidence, and which reaches conclusions that are unsupported and erroneous. A limited review of OI testimony also shows that OI has made serious misstatements in testimony before the Commission and Congress on this investigation. The process which led to publication of these adverse and erroneous conclusions against an individual with an impeccable record of achievement, public service, and integrity is patently unfair. Admiral White, TVA, and the NRC deserve much better than what has been delivered here.

ATTACHMENT B

LEGAL COMMENTS ON THE OI REPORT

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LEGAL COMMENTS ON THE OI REPORT

The following detailed comments on the unsigned OI Report on the Appendix B matter are intended to be illustrative, not exhaustive. Comment One addresses OI's faulty allegation that Admiral White did not testify honestly during his OI interviews. Comments Two through Six address a multitude of infirmities in OI's analysis of the March 20 and June 5, 1986 letters from TVA to the NRC which were the subject of OI's investigation.

Our comments conclusively demonstrate that OI's findings and conclusions on the March 20 and June 5 letters are erroneous, as is OI's indictment of Mr. White's testimony. The OI Report cannot be relied upon in its characterizations of the record OI itself accumulated. It is also apparent that OI failed to accumulate important information that should have been part of its investigatory record.

COMMENT ONE: OI FAILS TO DEMONSTRATE THAT ADMIRAL WHITE'S TESTIMONY WAS DISHONEST

There are many unsubstantiated conclusions in the OI Report. Although all such conclusions are faulty and unprofessional, perhaps the most egregious examples of these biased leaps in logic are the OI Report's conclusions regarding Admiral White's four alleged "Conflicts of Testimony" with other witnesses interviewed by OI. OI Report at 52-55. On the basis of these ascribed "conflicts," OI concludes that Admiral White knowingly and willfully provided false information to OI during the course of its investigation. This conclusion is erroneous and unsupported. Without analyzing all of the multiple threads of words and allegations at issue, the following points, which address each of the four instances of alleged false testimony by Admiral White, are illustrative:

A. The Timing of the Dictionary Definition of Pervasive

OI concludes that Admiral White lied to OI during the investigation. This conclusion is based on Mr. White's statement that his conversation with the TVA Manager of Quality Assurance (QA), Mr. Richard Kelly, about the dictionary definition of the word "pervasive" took place subsequent, rather than prior to the issuance of the March 20 letter, and that Mr. White used the NRC adjudicatory meaning, not the dictionary definition of pervasive on March 20. OI Report at 52-53. The significance of this OI

allegation is two-fold: it accuses Mr. White of dishonesty; it also suggests that Mr. White used a meaningless definition of a term-of-art contained in the March 20 Appendix B letter which would have been misleading to an NRC reader. The record does not support either of OI's rash and defamatory conclusions.

There is a difference in recollection between Admiral White and Mr. Kelly concerning the timing of the discussion of the dictionary definition of "pervasive". Whether this point is even material is highly questionable. As further explained in Comment Two (B), infra, both Mr. James Huston, Kelly's QA Assistant Manager, and Mr. Kelly considered the two definitions to be quite similar. See OI Interview of Huston, March 4, 1987, at 59-60; OI Interview of Kelly, Aug. 18, 1987, at 9.1/ Further, Mr. Kelly did not feel that the situation at Watts Bar was close to a pervasive breakdown under either definition. See OI Interview of Kelly, Aug. 18, 1987, at 11-14. It follows that the timing of the discussions of the two definitions is immaterial.

Nevertheless, on the issue of which definition of pervasive was discussed prior to March 20, OI improperly cites Mr. Huston in support of Mr. Kelly's recollection that the only definition of "pervasive" discussed prior to March 20, 1986 was the dictionary definition. See OI Report at 53. This reference is false. Mr. Huston specifically stated that he believed that the Callaway decision, which contains the commonly understood regulatory definition, was discussed before March 20, 1986. See OI Interview of Huston, Aug. 18, 1987, at 10.

Most significantly, the OI investigators have misconstrued or misrepresented Mr. Huston's testimony concerning what was discussed between February 20 and March 20, 1986. OI cites Mr. Huston in support of Mr. Kelly's recollection that not only did the discussion of the dictionary definition take place during

1/ The dictionary definition of pervasive was described as "extending into all parts." OI Interview of Kelly, March 3, 1987 at 52. The Callaway legal definition was described as "a breakdown of QA procedures of such magnitude that it casts some reasonable doubt on whether or not that plant . . . could be operated" safely. OI Interview of White, July 15, 1987, at 77; see Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 N.R.C. 343, 346 (1983) (in determining whether there has been a "pervasive failure to carry out the QA program" the issue is "whether there has been a breakdown in quality assurance procedures of sufficient dimensions to raise legitimate doubts as to the overall integrity of the facility and its safety-related structures and components") (emphasis added).

the February to March timeframe, but that the Callaway decision was not discussed prior to March 20. See OI Report at 53 ("HOUSTON (Exhibit 24, pp. 6-13), who was present during this discussion, supports KELLY's testimony that this event surely took place prior to March 20, 1986, and probably about February 20, 1986."). As the following quotation indicates, this is not what Mr. Huston said:

Q. The question is do you know if this concurrence was based on the dictionary meaning or the meaning discussed that day as to what the word pervasive in the letter meant?

A. It is very difficult. Because I believe by the time that this concurrence was had that there had been further discussion about the basis in Callaway, you know, the case law basis for the word pervasive relative to its definition as a regulatory term and having regulatory meaning.

I think in my first interview that you asked me if it had any basis and now could it, or words to that effect. And I believe that I answered that it must have had some meaning, because the ALJ had used it, the Administrative Law Judge had used it in his decision.

Almost certainly that must have come up between February 20th and this date. I cannot specifically recall any discussion which expanded beyond the dictionary definition into the Callaway case definition.

OI Interview of Huston, Aug. 18, 1987, at 10-11.

Mr. Huston's testimony seems to make clear that although he cannot remember a specific conversation about Callaway in that timeframe, he is confident that such a conversation did take place. Mr. Huston's recollection is supported by the fact, conveniently ignored by OI, that the so-called Edgar draft of the letter, which was written by Mr. White's attorney and which introduced the word "pervasive," was accompanied by a February 20, 1986 cover memorandum that specifically referenced and attached the Callaway case. In fact, Mr. Kelly's own testimony indicates that he gave Mr. White a definition of pervasive based on his understanding of Callaway before he went to the dictionary. OI Interview of Kelly, March 3, 1987, at 70-71. In short, the Callaway decision itself was in Mr. White's advisors' hands in the timeframe in question.

What does all of this mean? The one thing that the evidence does not establish is that Admiral White lied in relating his best recollections to the OI investigators. Even if Mr. Kelly had only the dictionary definition in mind when he concurred in the March 20 letter, there is no basis for concluding that Admiral White did. He testified that he did not. Mr. Huston believes both definitions were discussed prior to March 20. OI Interview of Huston, Aug. 18, 1987, at 10-11. And Mr. Kelly and Mr. Huston initially testified that he thought the word came from Callaway, i.e., the Callaway use of the term was discussed from the beginning. OI Interview of Kelly, March 3, 1987, at 70; OI Interview of Huston, March 4, 1987, at 58. Mr. Huston later testified that as of March 20, he had both definitions in mind, as well as the awareness that the Callaway definition had come from a respected lawyer in the area of NRC licensing. OI Interview of Huston, Aug. 18, 1987, at 12. Contrary to OI's conclusion, these varied recollections of individual experiences do not in any way indict Mr. White's credibility. See also Comment Two (B), infra. And, in any event, given the similarity of the two definitions, the timing of the discussions about the two definitions is immaterial.

B. The Review of the Lundin Group's Effort

The June 5 letter stated that a group of outside individuals (the "Lundin group") reviewed each of the NSRS perceptions, and that "a group of highly experienced non-TVA experts review[ed] this [the Lundin] group's findings." OI goes into elaborate detail on who reviewed the findings of the Lundin group, charging Admiral White with dishonesty in his testimony to OI on this subject. OI Report at 47-51, 52, 53-54. OI is wrong.

While there are various degrees of formality associated with the words "group" and "findings," the evidence of which we are aware is consistent on this issue and, contrary to OI's representations, supports Admiral White's understanding of the so-called "second group's" efforts.

In his testimony to OI, Admiral White repeatedly explained to OI what the second group did:

MR. WHITE: The second group? Well, you have to understand how I was operating. Mr. Kelly and Mr. Huston were the Q/A experts. Mr. Drotleff, and Mr. Kirkebo were the -- I would say the engineering, technical experts. Mr. Siskin and the rest of them had knowledge in the nuclear industry, and Sullivan, and so forth, so that I could periodically bounce things off of them that I had heard, maybe,

from other sources in this regard. And this was, by the way, very late in the game. This didn't happen until, probably, sometime in February or March. Mr. Brodsky was another one. . . .

* * *

What I tried to do in my review of the technical responses, was to find out from the specific individual that I was talking to whether he was familiar with the facts. Kind of whether he understood them. Whether the facts supported the conclusions, and whether the facts and the conclusions supported the basic letter. That was the thrust of what -- and I can only attest to, kind of, my thought process, as I went through with a few individuals, those technical responses, as -- as opposed to the --

MR. MURPHY [one of the OI investigators]: Who are them few individuals? Who are you talking about?

MR. WHITE: Primarily Mr. Kelly and Mr. Huston. In some technical issues, Mr. Kirkebo and Mr. Drotleff. I, occasionally, would bounce things off of other advisors, without necessarily attaching them to something in the Appendix, because this went over a period of days, that I reviewed these. Where I might, for example, have been told something by -- by Mr. Kelly, or one of the others, Mr. Kirkebo. And I might very well, then, turn to Mr. Sullivan, the next day, and ask him what he may not even have understood was part of the Appendix B.

But I would ask him a question, or Mr. Stone, or Mr. Siskin. I might or might not. In some cases I would say, you know, what do you think about this part of Appendix B, or I might just ask them a question. So, there were a number of people that were involved with that kind of thing. But primarily Mr. Kelly and Mr. Huston.

* * *

. . .[R]emember, I had a group, but not a group as a committee kind of group. That wasn't, well, let's all get together and review this thing. It was a group of people, but I was treating them as individuals, individuals for common purpose if I can put it that way.

* * *

And so as I say, on the other end of that spectrum is the person that I might have gone to. I might have gone to Siskin and said, if you knew A and B, and C is the facts, would you conclude D from that. And he might not even know I was -- what I was asking him something Kelly just told me.

And then I might go to Bass and I might say if I came to the conclusion of D, and I had A, B and C, is there anything else I would need to support A, B, and C to come to D.

And in that respect those senior managers, but it goes the full spectrum.

* * *

Q Reviewed the Lundin effort, and not just the NSRS perception.

A I would say both, both. I don't separate the two, frankly, the Lundin effort and the -- and what I call the line responses.

Q I see. All right.

OI Interview of White, July 14, 1987, at 159, 242; OI Interview of White, August 27, 1987, at 91-92, 93.

In short, Mr. White understood that a variety of his senior advisors and loaned managers independently reviewed the end-product of the Lundin group -- the attachments to the March 20 letter, and the group's endorsement of those attachments. But this was not a formal "group," nor were there formal "findings." As William Wegner, an advisor to Admiral White, recalled, the White advisors worked together in the so-called "bull-pen" -- a large room where they interacted constantly among themselves and Mr. White. OI Interview of Wegner, July 22, 1987 at 122-24; see

also OI Interview of Gridley, August 21, 1987 at 66-67 (e.g., "you have to remember that we had that big bull-pen and it was not uncommon for Mr. White to wander into the bull-pen, ask Sullivan a question or Siskin a question -- and these weren't bashful people, they would all chime in.")

The OI Report contains absolutely no evaluation by OI of Mr. White's recollections of how he used this "group" of advisors. We are aware of OI's claim that, contrary to Mr. White's testimony, none of Mr. White's senior advisors in-fact reviewed the findings of the Lundin effort. See OI Report at 47-51. OI is either deliberately distorting the evidence or misses the point, here. We do not know (we do not have the relevant transcripts) what questions OI asked the senior advisors and whether the form of the questions elicited the response by the senior advisors that their role was not to "review Lundin's findings." But that does not mean that they did not review the so-called line responses attached to the March 20 letter, as Mr. White indicated, which responses Lundin's February 7, 1986 memo endorsed. For example, Mr. Kelly testified that,

The ones that reviewed his [Lundin's] review were the advisers to White, who were Brodsky and Bass, Wegner and Siskin and Sullivan and Stone.

OI Interview of Kelly, May 12, 1987, at 9. Mr. Kelly explained that these individuals read the line responses and the Lundin memo and, in some cases, talked to Mr. Lundin. Id. at 10.2/

Mr. Kelly was the individual who was interfacing directly with Admiral White on the progress and content of the Appendix B letter. OI Interview of Kelly, May 12, 1987, at 83. ("My involvement in this was as a reader, to see if it [the attachments to the March 20 letter] made sense, and as a funnel to White to explain things so that he had some basic understanding of what the issues were."). And Mr. Kelly's understanding comports with that of Mr. White. Mr. Kelly also was the individual to whom

2/ See also OI Interview of Gridley, Aug. 21, 1987, at 68 (Nace, Siskin, Kirkebo, Kelly, Huston all "very involved" in Lundin's effort); OI Interview of Wegner, July 22, 1987, at 122-24, 220-24 (e.g., "White was using Henry Stone as a tutor . . . He said to me that there were many occasions where Stone didn't even know, where I would be asking him a question that had surfaced out of the 11 perceptions. So unbeknownst to Henry, Henry is really providing some input into the review process.")

Mr. Lundin reported in doing his work; so that while Mr. Kelly did not consider himself to be one of Mr. White's "kitchen cabinet", but, rather, was a loaned TVA manager, there is no question that Mr. Kelly was in the best position to know what was going on with respect to the Lundin effort -- he was responsible for it. See OI Interview of Huston, March 4, 1987, at 76-79 (Kelly and Huston picked Lundin team and Kelly gave them their charge); OI Interview of Kelly, April 18, 1987, at 96-99 (Kelly gave instructions to Lundin group).

In summary, there was a review by a group of highly experienced non-TVA experts, precisely as TVA and Admiral White indicated.

C. The Asselstine Conversation

OI next challenges Mr. White's veracity by pointing to Admiral White's recollection that he discussed the March 20 letter over the phone with Commissioner Asselstine, explaining that TVA was not addressing the past QA program at Watts Bar. OI Interview of White, Aug. 27, 1987, at 39. Mr. Asselstine apparently cannot remember this conversation. OI therefore concludes that Mr. White lied about its existence. OI Report at 54, 55.

OI's leap of logic here is bizarre, at best. Is it not much more likely that a witness would fail to recall a specific conversation than that another witness would entirely manufacture the existence of one? Surely, OI is not suggesting that Admiral White would not have expected OI to ask Mr. Asselstine about the conversation.

Furthermore, OI conveniently fails to mention the fact that Admiral White's recollections of this conversation on March 19, 1986 tend to be substantiated by telephone company computerized phone records for TVA, which substantiate that about a 15 minute conversation occurred between the Admiral and the Commissioner. It is somewhat hard to imagine that such a long conversation would take place the day before the letter was signed in which this issue would not even arise, particularly given Commissioner Asselstine's focus on the matter during the Commission meeting of one week previous (March 11). See, e.g., OI Interview of Huston, March 4, 1987, at 84 ("Commissioner Asselst[ine] pressed Mr. White on this question.") Moreover, given the record that supports the fact that Admiral White discussed the letter during phone conversations with Messrs. Stello and Denton on March 20, see OI Report at 40-43, isn't it unreasonable to assume, as OI does, that Mr. White did not discuss the substance of the letter with Mr. Asselstine when they talked at 5:27 p.m. the day before?

D. The Thompson Conversation

OI's final attack on Mr. White's testimony stems from a statement by Admiral White that he spoke with Hugh Thompson, a member of the NRC Staff overseeing TVA, in late-May, 1986 concerning the March 20 letter and the issue of whether TVA should issue a follow-up letter to NRC's May 16 reply to the March 20 letter. OI Interview of White, Aug. 27, 1987, at 71-72. Mr. White recalls Mr. Thompson's recommendation that TVA write a follow-up letter; he also recalls Mr. Thompson's statement that the NRC's Senior Management Team responsible for overseeing TVA was only concerned about one area covered by the March 20 letter, the area of design control, and that Mr. Thompson was not personally concerned about that. Id. Apparently, although we do not have his transcript, OI believes Mr. Thompson's recollection is different. See OI Report at 44-45, 54-55.

Once again, OI's conclusion about this inconsistency is that Admiral White lied. This conclusion does not even follow from OI's own characterization of the evidence. OI reports that "When interviewed, THOMPSON indicated that he had no clear recollection that such a conversation even occurred." OI Report at 44. It is therefore absolutely baffling that OI would then cite Mr. Thompson's presumptions about such a conversation -- which were not recollections at all -- to indict Admiral White. Obviously, if Mr. Thompson does not recall whether "such a conversation ever occurred," OI Report at 44, he has no recollection of the substance of that conversation. On the face of the available transcripts, there is absolutely no basis to conclude that Admiral White lied to the OI investigators.

Furthermore, Mr. White's recollection tends to be substantiated by the affidavits of Messrs. Vollmer and Olshinski, both of whom at the time considered the March 20 response to be reasonable, particularly in view of the difficulty of the question to which it was responding. Mr. Vollmer also recalled that other senior NRC staffers agreed with this perspective. Affidavit of Vollmer at ¶¶ 8-9; Affidavit of Olshinski at ¶¶ 10-11.

Finally, and perhaps most significantly, Mr. White's recollections of his conversation with Mr. Thompson are independently substantiated by telephone company computerized phone records for TVA as well as Mr. White's contemporaneous notes -- evidence which ordinarily is given extraordinary weight and credibility. OI not only fails to weigh the significance of this evidence, but utterly fails to mention it.^{3/}

^{3/} In contrast, the recent inquiry by the U.S. Government Accounting Office into NRC's internal investigation of certain NRC

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In conclusion, ignoring contrary evidence, taking evidence out of context, and perhaps, simply failing to understand its own record, OI leaps to severely damaging conclusions about Admiral White's character which are wholly unsubstantiated. Contrary to OI's conclusion, the evidence shows that Mr. White was honest during his interviews.

COMMENT TWO: OI MAKES UNSUBSTANTIATED AND ERRONEOUS CHARACTERIZATIONS

The OI Report concludes that Admiral White knowingly and willfully "obfuscated" the March 20 response to the NRC through the use of "unreasonably defined terms and limitations." OI Report at 55. In its Report, OI focuses on the following phrases:

- ° "issues identified in the NSRS Perceptions";
- ° "has been no pervasive breakdown";
- ° "problems have been identified; and that TVA has remedied or will remedy"; and
- ° "the overall QA program is in compliance".

OI does not make clear which of these words in its view are obfuscatory and which are unreasonably defined. But an examination of each phrase will show that neither of these characterizations is accurate.

A. "Issues identified in the NSRS Perceptions"

The March 20 letter's conclusions were expressly "bas[ed on] a review of the issues identified in the NSRS Perceptions." Both Admiral White and Mr. Kelly of Stone & Webster, who was the TVA Manager of QA at the time, understood the term "issues identified in" to mean the "bases" for the NSRS perceptions. OI Report at 19. There is no contradictory testimony. In fact, OI refers to

(Continued)

activities explicitly recognizes the credence to be given to Admiral White's contemporaneous notes, and the consequent credence to be given to Mr. White's testimony. GAO Report (April 22, 1988) at 12.

NRC testimony which confirms the limited scope of the TVA effort: according to OI, NRC's Special Inspection in December 1986 found that TVA's "process was limited to a narrow and expedited review of employee concerns associated with the NSRS Perceptions." OI Report at 15. TVA conducted a limited review; and this is what TVA said it did.^{4/} The words "issues identified in" are express words of limitation. They provide increased precision, not obfuscation.

OI's criticism is that "White and his advisors knew that the extent of the 'review' was much more limited than would be envisioned by the NRC readers of that phrase." OI Report at 19. But there is no evidence whatsoever as to what White or his advisors "envisioned" or could envision concerning what an NRC reader would understand. Nor is there any evidence supporting OI's view as to what an NRC reader in fact understood, although the sworn affidavits of Messrs. Vollmer, Eisenhut and Olshinski, which were deliberately ignored by OI, provide substantial material evidence on this point. For example, Mr. Olshinski stated:

There were a number of reasonable approaches TVA could have taken in addressing the matter, of which their approach was one. For example, in my view, TVA had no choice but to in some manner limit its answer, and it clearly did so by addressing only the issues NSRS identified to support their perceptions. . . .

Affidavit of Olshinski at ¶ 10.

In short, the OI conclusion has no premise, and is contrary to available evidence. Certainly, if there is any premise here that can be assumed, it would be that writers of letters to the NRC must be allowed to expect that express words of limitation will be understood to mean what they say.

B. "Has been no pervasive breakdown"

The March 20 letter concluded that, on the basis of the

^{4/} OI further states that "WHITE viewed the 'bases' as the limited number of documented employee concerns provided by NSRS to support the perceptions." OI Report at 19. The citations by OI do not support this assertion. Moreover, other sections of Mr. White's transcript show that by "bases," Mr. White meant any facts presented by NSRS to support their perceptions. OI Interview of White, July 15, 1987, at 117-21.

information reviewed, and notwithstanding the identification of problems at Watts Bar, there had been "no pervasive breakdown of the quality assurance (QA) program." The term "pervasive" is hardly a new term to the NRC. Attached hereto as Addendum 1 to Attachment B is a list of 14 uses of the term "pervasive" by the NRC. We presume that OI would not suggest that in these instances, NRC personnel used obfuscation or undefined terms. Nevertheless, OI draws that conclusion here, after pursuing with enormous fascination the meaning of the term, "pervasive".

OI's conclusion is inconsistent with the undisputed fact that this term-of-art was not introduced into the draft by Admiral White, who signed the letter, or by Mr. Kelly, the QA expert centrally responsible for the letter, but by expert counsel, who proposed language for the letter that would comport with applicable law. See OI Report at 20; see also Addendum 1. Not only did counsel cite to Callaway in his draft, but he discussed the Callaway decision in a February 20, 1986 memo that accompanied his draft, all of which was sent to one of Mr. White's advisors (Mr. Wegner) and the Director of Nuclear Licensing, Mr. Gridley. Attached to the memo was a copy of the Callaway decision. It is precisely this context -- the Callaway legal definition of pervasive -- that Mr. White recalls discussing prior to the issuance of the letter. OI Interview of White, July 15, 1987, at 75-79; see also OI Interview of White, Aug. 27, 1987, at 77-80. OI ignores this evidence.

Mr. Kelly himself testified that the term "pervasive" came from Admiral White's attorney, Mr. Edgar, which was "reasonable, because that's the licensing type terminology and that's his [the attorney's] forte." OI Interview of Kelly, March 3, 1987, at 68. OI ignores this testimony. When the Edgar draft was circulated, which used the term "pervasive," Mr. Kelly associated it with the Diablo Canyon and Callaway adjudicatory decisions, and gave Mr. White a definition of it. In response to a question about how he knew the term came from NRC licensing proceedings in the Diablo Canyon and Call[away] cases, Mr. Kelly stated, "I had read the Diablo Canyon and Call[away] decisions before I went to TVA. I knew the context in which it had been used." Id. at 70. OI ignores his testimony. Mr. Kelly further stated, "So I was familiar with the decisions where pervasive came into play and in that context or when that word was used White asked me to define it" Id. (emphasis added). OI ignores this testimony. It was after giving an initial definition, from his understanding of the cases, that Mr. Kelly thinks he "then went and got Webster's dictionary." Id.^{5/} OI ignores this testimony.

^{5/} Mr. White recalls that this conversation occurred substantially later. OI Interview of White, Aug. 27, 1987, at 77-80.

Mr. Kelly was specifically asked whether, "up until the time that the letter was sent out, did anyone differ over what the term pervasive breakdown meant"? His unequivocal response was, "No. Not that I know of." Id. at 72. OI ignores this testimony. OI asked Mr. Kelly whether he "had any discussions with Mr. White or anyone at TVA, for that matter, concerning the realistic possibility of their ever being a pervasive breakdown?" He responded, "No, we didn't. Didn't discuss that. First one that's raised in that context is Mark [Reinhart, one of the technical assistants to OI]." Id. OI ignores this testimony.

Furthermore, while Mr. Kelly did offer the so-called dictionary definition of pervasive, and at one point in his testimony recalled that this definition discussed in February, 1986, Mr. Huston, who was Kelly's QA Assistant Manager at TVA and fellow Stone & Webster manager stated, "I further believe that the word, pervasive, in this context comes from the Call[a]way decision before the AS[LA]B." OI Interview of Huston, March 4, 1987, at 58. OI ignores this testimony. OI also ignores the significant fact that Mr. Huston equated the Callaway and so-called dictionary definitions of the term. Id. at 59. Similarly, Mr. Kelly said that these definitions "are slightly different, but not in great substance are they different." OI Interview of Kelly, Aug. 18, 1987, at 9. Mr. Kelly also indicated that under either definition, there was no pervasive breakdown. OI Interview of Kelly, Aug. 18, 1987 at 11-14.

While Mr. Huston during his first interview could not recall whether the meaning of the term was discussed with Mr. White before March 20, 1986, he did recall "subsequent to the March 20th letter, there has been a tremendous amount, both in volume and over time, of discussion about the word, pervasive." OI Interview of Huston, March 4, 1987, at 59-61; compare Interview of Huston, Aug. 18, 1987, at 7. In addition, Mr. Huston specifically remembered discussing the Callaway definition of the term with the Licensing Manager, Mr. Gridley, before March 20, 1986. Id. at 61-62. OI ignores this testimony.

Finally, while Mr. Kelly would not have substituted the word "widespread" for the word "pervasive," see OI Report at 20, this was because of his opinion that widespread was a much more subjective term. See OI Interview of Kelly, Aug. 18, 1987 at 14-18. As Mr. Kelly explained,

I was not trying to be cute or overly precise in what was in my mind. I was trying to give a sense of realistic and reasonable sense of what we had for facts at the table. And if substantially everything had been wrong, then

I would not have recommended that we sign that letter I was a far different -- long way from having to rely on a dictionary definition of pervasive [M]y recollection was that we didn't discuss widespread. But if it had been raised then, as it was subsequently raised, I would still not concur because widespread is a qualitative and is not a quantitative term. It has no specific connotation.

Id. at 11-12, 14. And while Mr. Kelly may have semantically considered pervasive to mean a one hundred percent breakdown, Mr. Huston observed, "[T]o me the notion that in order to be not in compliance with App. B one would have to find pervasive in the sense of 100 percent being out of compliance with App. B is to me a nonsensical concept." OI Interview of Huston, Aug. 18, 1987, at 12. Mr. Huston also stated that this incorrect concept was never discussed as the basis for using the word pervasive in the March 20, 1986 letter. Id. at 13. OI ignores this testimony.

In short, it is OI's manufactured argument, not that of the witnesses, that there was any significant difference of opinion among Mr. White's advisors as to the precise meaning of "pervasive" at the time the March 20 letter was issued, and whether there was in fact a pervasive breakdown under any definition. Similarly, contrary to OI's insinuation, the record does not suggest that Admiral White or TVA had any obfuscating or other ill motive when it used the word "pervasive" in its response to the NRC. As Mr. Huston observed, "there was no intent ~~was~~ to use words that would be confusing I think the intent was to use words that would convey the situation." OI Interview of Huston, March 4, 1987, at 92.

C. "Problems Have Been Identified..."

OI makes much of the change in the draft of the March 20 letter from the so-called Edgar draft, prepared by Mr. White's attorney, which states "the program has identified and TVA has remedied or will remedy all identified construction deficiencies and noncompliances," to a subsequent draft which instead says that "problems have been identified; and that TVA has remedied or will remedy all identified design/construction deficiencies and noncompliances." OI Report at 18, 21-23. Without any evidentiary support, OI concludes from this change that "TVA consciously avoided saying that the QA program had identified problems." OI Report at 21. The basis for OI's criticism is unfounded. Since problems had been identified through avenues other than the QA program, this change is more precise. Should TVA nevertheless have left it as initially prepared by Mr. Edgar? More

importantly, as acknowledged by OI, the final letter specifically recognized that the effectiveness of corrective actions was an issue of concern to TVA and Admiral White. The change in the letter from the Edgar draft is more consistent with that acknowledgement. But in any event, OI utterly fails to provide any testimony as to why the change was made. At a minimum, some explanation of nefarious motives is necessary, in view of the fact that, once again, the change increased, rather than decreased, the letter's accuracy and precision. This is also an instance where no evidence is provided as to who made the change; and the record of which we are aware shows that it was not Admiral White. See OI Interview of White, July 15, 1987, at 15.

In short, if the phrase at issue is read in context, there is no issue of truthfulness here. It is by focusing on words or sentences in isolation from one another that has caused OI to stumble so badly.

D. "The overall QA Program is in compliance"

In its typically one-sided, poor analysis, OI's indicts TVA for its use, in the March 20 letter, of the phrase, "The overall QA Program is in compliance." OI Report at 23-24. It is not clear whether OI believes these words are difficult to understand, whether it disagrees with this judgment call, or whether OI simply is critical of TVA for not telephoning anyone at the NRC earlier in the process. See OI Report at 18 and 23. In any event, the term "overall compliance" also has been previously utilized by the NRC. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 N.R.C. 445 (1983) (unpublished findings of fact). Presumably, the Atomic Safety and Licensing Board understood the term when it used it, and did not intend it to be obfuscatory. OI's presumption to this effect in this particular instance is without any record support.

In its Report, OI seems to take issue with Mr. Wegner's quoted statement that by answering NRC's question in terms of overall compliance, "we answered what we thought the NRC was asking and later confirmed ..." OI Report at 18. In its written reply of May 16, 1986, the NRC, while reserving its conclusion, implied that TVA was answering the right question, since it did not state otherwise. If the NRC had felt that TVA's March 20 letter was nonresponsive, no doubt it would have required a further response from TVA. Moreover, the May 16 NRC reply specifically stated that the TVA "response acknowledged that noncompliances existed." It thereby recognized that "overall compliance" did not mean one-hundred percent compliance.

In short, at most, what we have here is a difference in judgment as to what constitutes compliance -- not an omission in

factual presentation. As OI notes, NRC attorney James Lieberman "pointed out that the line between missing individual [QA] criteria and a breakdown is one of judgment and experience" (neither of which OI has in the Appendix B area). OI Report at 45. And the available evidence on this point by sworn affiants suggests that the TVA judgment was reasonable and, in fact, understood and supported within the NRC by experienced and knowledgeable senior members of the NRC Staff. See Comment Four, infra.

In this context, OI notes somewhat critically that calls were made by Admiral White to senior NRC officials after the March 20, 1986 letter had been essentially finalized. What OI fails to note in its Report is that (1) the late stage of the process at which NRC was called tends to confirm the stated purpose of the calls, namely, the ensure that the letter was fully responsive to NRC's request; (2) Admiral White's attorney specifically advised Mr. White to call the NRC in order to ensure that the letter was responsive to NRC's concerns; and (3) no NRC official in those phone calls even suggested that the letter was not responsive to the question asked.

In short, TVA's statement of "overall compliance" would appear to be reasonable and certainly not improper.

Summarizing our Comment Two, OI argues that, "TVA consciously made changes in the final series of draft cover letters that made the terminology vague and more susceptible to interpretation, as opposed to the terminology used in earlier direct responses." OI Report at 51.6/ This OI conclusion is erroneous on two accounts. The evidence does not support the view that the letter became increasingly vague; the evidence also does not indicate that there was any intent to be vague.

COMMENT THREE: OI MAKES MATERIAL OMISSIONS AND CONSEQUENT MISREPRESENTATIONS OF THE RECORD

In many instances, the OI Report omits or misrepresents material information provided to it. Then, as a result of its severely incomplete or biased presentation of the facts, OI draws what apparently are predetermined conclusions. The following examples are illustrative.

6/ OI's only reference in making this broad-brush accusation is to the various drafts of the March 20, 1986 letter.

A. OI is critical of Mr. White and implies a nefarious motive when it states that "senior, tenured, TVA Managers were not formally included in the process of writing, editing, or commenting on the final Letter of Certification". OI Report at 16. The reference, here, is to the final March 20 letter on Appendix B sent to NRC by TVA. OI fails to point out Mr. White's simple and straightforward explanation of why he deliberately relied on outsiders, rather than long-time TVA managers, in preparing the March 20 letter, in order to assure an independent and unbiased response. OI Interview of White, July 14, 1987, at 235-37 (e.g., "I was depending on people, like myself, who had no ax to grind, no preconceived notions.") In short, without any explanation or justification for doing so, OI simply ignores record evidence of a sensible management decision in order to present its unsubstantiated and biased conclusion of impropriety.

B. OI states that "The TVA QA Manager, MULLIN, stated that TVA adopted the stance that they were in compliance with Appendix B until proven otherwise". OI Report at 17. (This representation was quoted from the OI Report essentially verbatim by columnist Jack Anderson.) A review of the transcript of Mr. Mullin's two days of interviews by OI reveals nothing which even remotely resembles the statement OI attributes to him. In fact, if anything, Mr. Mullin's point of view was 180 degrees different from the view OI ascribes to him. For example, Mr. Mullin explained,

[W]hen we're asked are we meeting the requirements of Appendix B, we basically ask, do we have a program that's in accordance with NRC regulations and are we adequately implementing that program. . . NRC had reviewed our program and had approved it. So the question then becomes one of implementation. . . It's not a black and white answer. You have deficiencies. If the deficiency means that you're not meeting the requirements with respect to implementation, if that's your interpretation of the question, then the answer is no.

OI Interview of Mullin, May 13, 1987, at 45. In other words, contrary to OI's allegation, Mr. Mullin did not believe that the existence of an approved QA program meant that TVA was "in compliance with Appendix B until proven otherwise." Rather, he felt it was necessary to show effective implementation of the program in order to be in compliance with Appendix B.

C. OI challenges the time frame applicable to TVA's statement in its March 20 letter of overall compliance with Appendix B. OI Report at 24. Once again, the OI Report utterly fails to

report that (i) the January 3, 1986 letter to which TVA was responding appeared to be asking only about current compliance; (ii) Admiral White explicitly told the NRC in an open Commission meeting on March 11, 1986 that he would so limit the timeframe of his reply to the January 3, 1986 NRC inquiry; and (iii) the NRC understood Mr. White's testimony on March 11, 1986 that his letter would not address QA matters at Watts Bar that had occurred in the past. No one at the NRC voiced any objection to Admiral White about this approach. Affidavit of Eisenhut at ¶ 6.

D. OI attributes to the TVA Licensing Manager, Mr. Gridley, the concept that in preparing the March 20, 1986 letter, TVA developed a "strategic response," as if this was a venal posture. OI Report at 25. Again OI fails to address or cite the explanation in the record which utterly benignly defines that phrase. As Mr. Gridley explained,

We would have been better off if we had just said here is the response and not try and fool around with being strategic on the transmittal letter. . . . So to answer your question, the strategic part of that letter, which I didn't appreciate at the time, was White's commitment to deal with the problem, and not just that problem, but the way he was going to manage TVA was to assess -- . . . I believe that he wanted to in his first external communication establish a style. If there is a problem, and the NRC identified a problem and they were on target, I've looked at it, I'm going to keep looking, and when I find the problem I'm going to report it and I'm going to fix it.

OI Interview of Gridley, Feb. 11, 1987, at 16-18.

E. OI reports that Mr. Kelly told a TVA licensing engineer, Mr. McDonald, that the March 20 response would address programs, not implementation. OI Report at 25, 36. But the OI report omits Kelly's absolute denial of this allegation. OI Interview of Kelly, May 12, 1987, at 92-93. Mr. Kelly recalled talking twice to Mr. McDonald, but not concerning the issue of programs versus implementation. Id. Furthermore, the letter does encompass implementation. See, e.g., OI Interview of Kelly, Aug. 18, 1987, at 62; OI Interview of Kelly, May 12, 1987, at 63-74; OI Interview of Wegner, July 22, 1987, at 128; OI Interview of Huston, March 4, 1987, at 76.

F. OI reports on the NSRS Director's qualified concurrence. OI Report at 28. OI conveniently fails to note that

Admiral White only learned of the qualified concurrence substantially after issuance of the March 20 letter. OI Interview of White, July 14, 1987 at 188-189; OI Interview of White, Aug. 27, 1987, at 11-15. OI concedes that the Director of NSRS "agreed with the letter." OI Report at 28. After-the-fact, the NSRS Director decided to limit his concurrence because some of his staff, who initiated the inquiry into Appendix B, would not have concurred, and these individuals were threatening to "destroy" the Director by making him "appear before Mr. Dingell and his committee" if he wasn't more responsive to them. OI Interview of White, July 14, 1987, at 168. Nevertheless, the Director of NSRS remained convinced that the letter was correct. See OI Interview of Gridley, Aug. 21, 1987, at 31-32. With the NSRS Director's steadfast agreement with the letter, the issue of NSRS involvement in the letter is moot. OI does not address this matter.

Furthermore, OI cites the NSRS Director's transcripts for the proposition that the NSRS staff was not afforded an opportunity to review the March 20, 1986 letter prior to its submittal. OI Report at 28. We have not been allowed to see these transcripts. However, the evidence we have seen suggests that if the NSRS staff did not see the draft, that was probably a result of the NSRS Director's actions, and certainly not because of any action on the part of Admiral White. See, e.g., OI Interview of Terrill, a TVA licensing engineer, Nov. 13, 1987 at 21-22 (draft of letter provided to Whitt for his comments or comments of his staff).

G. One conspicuous example of the OI Report's internal inconsistencies concerns a telephone call between Admiral White and Mr. Harold Denton, then the Director of NRC's Office of Nuclear Reactor Regulation. Mr. White attributed a late addition to the March 20 letter to a suggestion by Mr. Denton during a telephone call with Mr. White. OI notes this, then simply says that Mr. Denton did not recall making any suggestions to Mr. White. OI Report at 24. The impact is to imply that Admiral White is in error, or even lying.

In contrast, later in the OI Report, OI acknowledges that, after Harold Denton gave "no indication" (did he deny?) in his first two interviews that he had talked with Mr. White about the contents of the March 20 letter, when confronted with Mr. White's testimony at a third interview, Mr. Denton finally "did not challenge WHITE description of their conversation" but "had no clear recollection of the telephone call." OI Report at 43. OI does not address or resolve its own statements on this matter, but instead, from its first statement, improperly suggests that Mr. White is contradicted by Mr. Denton.^{7/}

^{7/} As an aside, we wonder why OI included an entire paragraph in its Report on a White/Stello telephone call on April 30, 1987.

(Continued Next Page)

In general, we note that for the most part, OI ignores telephone company computerized records for TVA as well as Admiral White's contemporaneous notes -- considered the "best evidence" in normal legal contexts. The conspicuous and inconsistent exception to this significant omission is in circumstances where there is no inconsistency between Mr. White's recollections and the ascribed recollections of others. Compare OI Report at 40-42 (conversation with Stello) and OI Report at 43-44 (conversation with Taylor) with OI Report at 38-40, 54 (conversation with Asselstine; telephone records not addressed); OI Report at 44-45, 54-55 (conversation with Thompson; telephone records and contemporaneous notes not discussed). OI also omits any reference to the testimony of Mr. Wegner, an advisor to Mr. White, who stated that Admiral White called him at the time to tell him about his conversation with Mr. Denton. OI Interview of Wegner, July 22, 1987, at 194-95.

In a related inquiry into the White/NRC Staff telephone calls, the U.S. General Accounting Office (GAO), Office of Special Investigation, recently observed:

White asserted that it was his discussion with Denton, not with Stello, that led him to make a clarification in TVA's response. White made contemporaneous notes of his conversations, which he provided to GAO. These notes, which were part of White's ongoing diary for this period, add credence to his version of what transpired in his conversations with NRC Officials.

GAO Special Report (April 22, 1988) at 12.

In remarkable contrast to OI's findings and innuendo, the GAO Special Report of April 22, 1988 reports that, "When interviewed, Stello and Denton's account of the events coincided with White's version of what transpired in the telephone calls of March 20, 1986." Id.

(Continued)

OI Report at 41-42. The transcript of Mr. White's interview and the date of the call demonstrate that it had no relevance whatsoever to the preparation of the March 20 or June 5, 1986 letters. Its inclusion is particularly remarkable in view of the omission of extensive material information.

H. OI focuses on the June 5, 1986 letter sent by TVA to the NRC. OI concludes that this letter was willfully and materially false. See OI Report at 52, 55. One of the bases for this conclusion is the fact that the June 5 letter repeated the conclusions of the March 20 letter, a fact which is true but, as set forth elsewhere herein, does not lead to a conclusion of false representation. Another criticism of the June 5 letter is that it misrepresented the so-called Lundin effort, which allegedly "was not intended to, and could not have determined compliance or non-compliance with Appendix B, even within the boundaries of the NSRS perceptions." Id. This allegation is incorrect.

Mr. Lundin was an employee of Stone & Webster who was asked to participate in the March 20 letter preparation. We cannot address all of the documents on which OI relies to challenge the so-called Lundin effort because TVA (and Mr. Lundin) have been denied access to two of the referenced exhibits, the Staff Special Inspection Report and Mr. Lundin's transcript of February 26, 1987. However, we do have access to two of the cited transcripts, and what we can do, once again, is address testimony in those transcripts that is omitted from OI's Report.

The June 5 letter states that the so-called Lundin group^{8/} conducted "a review of each one of the [NSRS] perceptions." The evidence indicates that this in fact is what the Lundin group did. The basis for OI's quarrel with this statement is unclear; however, it appears to be based on a disagreement with the extent of that review. Any such disagreement certainly does not convert the sentence into a material false statement.

In his February 7, 1986 memorandum that memorializes the work of the Lundin group, Mr. Lundin stated:

[The Lundin group] reviewed draft responses to [NSRS] concerns, contacted the people investigating and responding to the concerns, interviewed site personnel involved in the activities mentioned in the concerns, reviewed pertinent documents, and performed any other activities deemed necessary to validate the responses to the concerns and methods used to develop the responses. They also, with the assistance of NSRS personnel, reviewed some of the investigations used to develop the NSRS concerns.

^{8/} For a discussion of the Lundin group's qualifications, see Comment Three, Section I, infra.

Based on his review, the Lundin group concluded, "No activities were noted, nor information received, which would be considered to be in noncompliance with 10 CFR 50, Appendix B "

In addition, Mr. Huston, who along with Mr. Kelly organized the Lundin group, provided this description of the group's purpose:

My understanding was their charge was to go out, take a look at the material that was being prepared by TVA in response to the 11 perceptions; in addition, to look at the activities that were ongoing in these areas, to make sure that they didn't see any major disconnects between what TVA was doing in the field and what was normal practice in their experience.

OI Interview of Huston, March 4, 1987, at 78. Mr. Huston was then asked whether, on the basis of the Lundin group's efforts, he was comfortable with assuring the NRC that there had been no pervasive breakdown and that the overall QA Program was in compliance. His response was, "Yes, sir." Id. at 79. In short, while OI cites Mr. Huston for the proposition that the Lundin review could not have determined compliance with Appendix B, in fact Mr. Huston testified just the opposite. See id. at 127-28.

Mr. Kelly, the Manager of QA, elaborated further on the Lundin group's purpose:

We started it [the Lundin effort] primarily to calibrate the information, to see if it was valid, and the Lundin report or letter is couched in those terms, what they did and that they found things in process and they did not find any problems. It was a very vital link in making the determination that what we had was valid. We could not have accepted the line organization's input as being totally reliable without testing it.

OI Interview of Kelly, March 3, 1987, at 41-42. In his testimony, Mr. Kelly then questioned his interrogator, OI technical assistant Mark Reinhart, for suggesting that this description was necessarily at odds with the statement in the June 5 letter. Id.

While we cannot attest to the accuracy of OI's characterization of the Staff Special Inspection Report, OI does not deal with its own characterization in addressing the issue of what the Lundin group did. Specifically, at pages 14-15 of the

OI Report, citing the Special Inspection Report, OI states that "the SWEC outside group [the Lundin group] reviews focused primarily on the technical position responses already prepared by the line organization." These responses were "in areas covered by the NSRS Perceptions."

Thus, even the Special Inspection Report describes the Lundin effort as a review and test of the NSRS perceptions (albeit not, in their view, an adequate one), as asserted in the June 5 letter. That statement is correct.

In short, OI has not accurately characterized the totality of the evidence on the issue of what the Lundin group did.

I. OI also challenges the June 5, 1986 letter for its reference to the Lundin group's "significant and extensive nuclear QA experience." OI Report at 47. First of all, OI misquotes the June 5 letter. The June 5 letter stated that the Lundin group had "significant and extensive nuclear QA experience in the areas questioned" (emphasis added). OI itself implicitly acknowledges that two-thirds of the group had significant QA experience. OI Report at 47. Furthermore, contrary to OI's apparent understanding, the letter did not say that the Lundin group necessarily worked in QA Departments. Relevant QA experience can, even more appropriately, be obtained from actual project experience. As Mr. Lundin stated in his February 7, 1986 memorandum on the Lundin effort,

[The Lundin group was] selected on their knowledge of the engineering, construction, quality assurance, and regulatory processes required for nuclear power plant licensing in the current regulatory environment. All are presently, or have been recently assigned to near-term operating plants and have all participated in similar investigations of identified issues and the development of responses to those issues.

The June 5 description of the Lundin group fully comports with the following description of the group by Mr. Huston, who assisted Mr. Kelly in selecting the group:

Some of them, in fact, were people who worked for me in Field Quality Control. We picked people that were at NTOL[s] who were in the field today, and we didn't pick the super -- necessarily the supervisor, we picked the people who were down in a QA QC program where the rubber meets the road in the construction of the plant

OI Interview of Huston, March 4, 1987, at 77.

In summary, the OI Report misrepresents the record.

COMMENT FOUR: OI FAILS TO CONSIDER HIGHLY
MATERIAL EVIDENCE

In the middle of its Report, OI notes, in passing, the existence of the affidavits of Messrs. Eisenhut, Vollmer and Olshinski. OI Report at 25. But the substance of the affidavits are never discussed.^{9/} These three individuals were senior NRC experts and managers who held positions with significant oversight responsibility for TVA in the very time frame in question. Mr. Eisenhut, for example, was the Deputy Director of the NRC's Office of Nuclear Reactor Regulation (NRR) who signed the two letters that prompted TVA's March 20 and June 5, 1986 responses. All three gentlemen were active participants on the Senior Management Team (SMT), the NRC group managing NRC's regulation of TVA. Not only did OI ignore the affidavits of these material witnesses, but OI did not even interview these former senior NRC staff officials who were each significantly involved in events leading up to and following issuance of the March 20 letter. This omission is extraordinary, particularly in view of the fact

^{9/} In his April 21, 1988 testimony before the Subcommittee on Oversight and Investigations, Mr. Hayes feebly attempted to rationalize his deliberate omission of this material evidence as unnecessary, on the remarkable basis that OI began with the presumption that the March 20 letter was materially false. Transcript of Hearing on the NRC's Oversight of the TVA, Before the House Subcommittee on Oversight and Investigations (House Transcript), Apr. 21, 1988 at 32-33. At best, this is ridiculous. The affidavits bear directly on the issue of whether witnesses' testimony on the meaning and scope of the letter is reasonable. Moreover, if OI had only been investigating whether Admiral White intended to say what he in fact said, the entire investigation could have consisted of a one-page interview with the Admiral, who would have said, "Yes." Mr. Hayes' statement does not make it so. In fact, OI spent many months and untold dollars trying to determine what the March 20 letter really meant, what it was intended to mean, and how it was understood. For example, how can you conclude that words in a letter "obfuscate" without first determining what they mean and whether their meaning is correct? And, after all, if the words in the March 20 letter were not established to be false and material, whether they were willful would itself be immaterial.

that none of the affiants believes that the letter contains a material false statement.

A. Affidavit of Darrell Eisenhut

Mr. Eisenhut currently is a Vice President of NUS Corporation. He left the NRC in 1986 after working there for 18 years. At the time he left, he was the Deputy Director of NRR. The January 3, 1986 letter from NRC that prompted the March 20 response was signed by Mr. Eisenhut, as was the NRC's May 15, 1986 response to the March 20 letter. In 1985 and 1986, Mr. Eisenhut served on NRC's SMT, the NRC staff management group responsible for overseeing TVA. There were about half a dozen members of the SMT, including Mr. Hayes.

In his affidavit, Mr. Eisenhut states:

i. The March 20, 1986 letter was "not capable of misleading a reasonable agency expert" -- the applicable legal standard for materiality. Virginia Electric & Power Company (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 N.R.C. 480 (1976), aff'd, 571 F.2d 1289 (4th Cir. 1978), cited in 52 Fed. Reg. 49362 (Dec. 31, 1987) (discussion of NRC's revised policy on completeness and accuracy of information, including material false statements).

ii. The January 3, 1986 letter requesting TVA to respond to NSRS' perceptions could well have been understood by TVA (as it was) as being a limited inquiry focused on what the facts behind NSRS' perceptions would cause TVA to conclude about current regulatory compliance with Appendix B. In short, Mr. Eisenhut understood that the January 3 letter need not have been understood as an all-encompassing inquiry about Appendix B generally, past and present, at Watts Bar, as some (e.g., OI,) apparently have interpreted it.

iii. Prior to sending the March 20 letter, in an NRC public meeting on March 11, 1986, Mr. White testified that his letter would not address QA matters at Watts Bar that had occurred in the past; no one at NRC voiced any objection to White about this approach. In short, Mr. Eisenhut is suggesting that to accuse White of wrongdoing now for it (which OI is doing) is unreasonable.

iv. The March 20, 1986 letter itself acknowledges that problems existed at Watts Bar and that TVA's technical review of the NSRS issues was continuing.

B. Affidavit of Richard H. Vollmer

Mr. Vollmer currently is Vice President of TENERA, a nuclear consulting firm. Mr. Vollmer left the NRC in 1987. While at the NRC, Vollmer was the Chief of the QA Branch from its formation in 1972 to 1976; Director of the Division of Engineering of NRR from 1980 to 1985; Deputy Director of Office of Inspection and Enforcement (I&E) from 1985 to 1986; and Deputy Director of NRR (replacing Eisenhut) from 1986 to 1987. During the time Mr. Vollmer served as Deputy Director of I&E, I&E was the group within NRC responsible for QA matters. Mr. Vollmer also attended SMT meetings, generally on behalf of the Director of I&E and then in his capacity as the Deputy Director of NRR.

In his affidavit, Mr. Vollmer states:

i. The March 20 letter does not constitute a material false statement.

ii. The March 20 letter is a reasonable response to a difficult question that had been posed by NRC to TVA. It acknowledged that many problems existed at Watts Bar, but concluded that overall, things were generally under control.

iii. Other senior members of the NRC Staff shared Mr. Vollmer's view about the reasonableness of the March 20 letter.

iv. There were NRC Staff members who, because of their "rigid and incorrect interpretation of Appendix B," felt that Appendix B could not be met at a facility at which multiple problems were surfacing. Mr. Vollmer, who is highly expert on QA and extremely knowledgeable about TVA, believes the rigid view of compliance with Appendix B is technically incorrect.

v. Substantial pressure was placed on the NRC Staff by Henry Myers, of Congressman Udall's staff, about the March 20 letter. The NRC Staff felt continuing pressure from Mr. Myers and was concerned about being subject to Congressional criticism. Mr. Myers frequently called Mr. Hayes, among others, with allegations relating to TVA's nuclear program.

vi. After initially focusing TVA's attention on the issues underlying NSRS' perceptions, to which TVA responded on March 20, NRC subsequently, by letter dated May 16, 1986, broadened its inquiry of TVA to include other related issues, e.g., TVA employee concerns. One can infer from Mr. Vollmer's statement that to hold TVA or White accountable for allegedly making a very broad statement in the March 20 response, would be incorrect and therefore inappropriate. Mr. Vollmer was "not at all surprised" by TVA's June 5, 1986 response to the NRC's May 16 letter, including

the expression in the June 5 letter of some uncertainty about whether TVA and the NRC Staff were both addressing the same question.

vii. Mr. Hayes was personally involved in and well aware of the fact that there were ongoing NRC staff discussions, e.g., SMT meetings, concerning what compliance with Appendix B meant, and what the March 20 letter meant. One can infer from Mr. Vollmer's statement that Mr. Hayes clearly knew what Mr. Vollmer (and probably Messrs. Eisenhut and Olshinski), thought about these issues, viz., that there was no material false statement here. Mr. Hayes failed to instruct his investigators to interview these material witnesses, whose views were not in agreement with his preconceived conclusions.

C. Affidavit of John A. Olshinski

Mr. Olshinski currently is employed as General Manager for Nuclear Energy Consultants, Inc. Mr. Olshinski spent approximately 9 years at the NRC and 10 years in the U.S. Navy's nuclear program. He was Deputy Regional Administrator, Region II, at the time he left the NRC. Mr. Olshinski was a member of the SMT and was assigned full-time to TVA activities. All Region II-based inspectors assigned to TVA activities reported to him. In short, Mr. Olshinski was very knowledgeable about TVA.

In his affidavit, Mr. Olshinski states:

i. He did not and does not believe the March 20 letter contains a material false statement.

ii. The March 20 letter could not possibly have misled NRC.

iii. The March 20 letter did not obfuscate the fact that there were problems at Watts Bar.

iv. There can be numerous regulatory violations at a plant and the plant can still be in overall compliance with Appendix B.

v. At the time of Commissioner Asselstine's briefing by NSRS in December 1985, NRC knew more about allegations surfacing at TVA than did TVA, because the allegations were confidentially provided to NRC and certain members of Congress, and yet the NRC did not have information that had caused it to conclude that Watts Bar was not in overall compliance with Appendix B.

vi. TVA could not have provided a response to NRC's January 3 letter which would have been well-received.

The subject that TVA had been asked to address was highly politicized; no matter how TVA answered the letter, its answer would have caused a significant debate within the NRC, and among TVA's critics at the time. In short, I do not think that the January 3 letter was a very fair letter, and I believe that others in the NRC shared my view about the virtual impossibility of TVA resolving the issue raised in the letter in an uncontroversial manner. (Olshinski Affidavit at ¶ 8.)

vii. TVA's approach, in its March 20 letter, was reasonable.

viii. TVA had no choice but, in some manner, to limit its answer. TVA appropriately did so by addressing only the issues the NSRS staff had identified to support their perceptions.

In summary, the OI Report is fundamentally flawed in its failure to address in any manner the affidavits of Messrs. Vollmer, Eisenhut and Olshinski.

COMMENT FIVE: OI MATERIALLY DISTORTS THE RECORD
BY TAKING STATEMENTS OUT OF CONTEXT

In its review of the March 20, 1986 letter, OI has focused exclusively on the following single sentence:

On the basis of a review of the issues identified in the NSRS Perceptions, as reflected in the enclosure, I find that there has been no pervasive breakdown of the quality assurance (QA) program; that problems have been identified; and that TVA has remedied or will remedy all identified design/construction deficiencies and noncompliances, and that accordingly, the overall QA program is in compliance with 10 CFR Part 50, Appendix B.

The OI Report totally ignores the very next sentence in the letter which necessarily implies a recognition by TVA and Admiral White that "the management and management controls of all TVA nuclear power program activities, including those for QA" require enhancement (emphasis added). In short, TVA and Admiral White expressly recognized in the March 20 letter that TVA's management of QA was not what it ought to be. (In fact, it was public

knowledge that Admiral White had come to TVA because of the need for enhanced management and management controls of all TVA nuclear power activities, including those for QA.)

Furthermore, the next paragraph in the March 20 letter, which was also entirely ignored by OI, explicitly states that the QA program effectiveness "at Watts Bar in particular" would receive "further examination," and that the "examination of QA activities within the nuclear program, including those at Watts Bar, ... will focus particularly" on NSRS' concern about "ineffectiveness of corrective actions, and management implementation of those actions, to prevent the recurrence of design/construction deficiencies and noncompliances". These very strong qualifications necessarily make the sentence focused on by OI tentative -- and, patently, deliberately so. Yet OI is inappropriately silent on these qualifications.

It is ironic that the OI Report contains an Investigator's Note criticizing TVA for failing to explicitly state that the "only" aspect of the overall perceptions reviewed by the preparers of the enclosure were the 117 examples of employee concerns provided by NSRS. OI Report at 19. Yet OI fails to inform the Commission that the "only" sentence evaluated by OI in its Report is the single sentence quoted above. OI fails to call to the attention of the Commission the contents of the balance of the letter. The only exception to this omission is on page 21 of the Report, where OI refers to other portions of the letter in order to facilitate an implied charge that Mr. White's acknowledgement of problems with the corrective action program was inconsistent with the basic position taken in the letter. But this acknowledgment was an integral and material part of the basic position taken in the letter!

Thus, for example, OI begs the question when it suggests that Mr. White and his advisors should have reflected in the March 20 letter what they learned during the November 1985 management assessment of TVA's nuclear program and the January 1986 Stone & Webster listing of issues/concerns at TVA. OI Report at 32-35. The March 20 letter specifically answered the NRC's January 3 letter within the terms invited by the January 3 letter and as specifically spelled out in the March 20 letter -- with reference to "the issues identified in the NSRS perceptions." At the same time, the March 20 letter reflects the fact that Admiral White and his advisors knew that the effectiveness of the QA program at Watts Bar would have to be enhanced and said so to the NRC.

In summary, the OI Report is fatally flawed by its unjustified focus on a single sentence taken out of context in a four paragraph letter.

COMMENT SIX: OI ATTRIBUTES KNOWLEDGE AND WRONGDOING
TO ADMIRAL WHITE WITHOUT ANY SHOWING OF
HIS KNOWLEDGE OR INTENT

The OI Report concludes that Mr. White knowingly and willfully submitted material false statements in his letters to the NRC. When NRC brings such charges against an individual, it would be appropriate and fair to show that the individual knew that the alleged false statements were untrue. The OI Report is, at best, a potpourri of background materials, selective quotations and, primarily, paraphrases from certain interviews. It references all sorts of individuals, only some of whom actually participated in the preparation of the letters. Nowhere is there a clean delineation of what Mr. White presumably knew or understood, as opposed to what others may have known.

For example, the OI Report colloquially summarizes or paraphrases dozens and sometimes hundreds of pages of transcripts and documentation. It does so with virtually no specific citations to the record. See, e.g., OI Report at 16-19 (description of "Sequence of Drafts and Significance of Draft from Non-TVA Attorney George EDGAR"); OI Report at 35 (description of "EG&G Welding Review"); OI Report at 38 ("Comparison of Requirements of Appendix B with known deficiencies at WBNP"). A conspicuous exception to this sloppy approach is its lengthy quotation from a 1985 Stone & Webster document which it uses to attribute improper motives to Admiral White. OI Report at 32-33. OI never mentions the fact that Admiral White had never seen the internal Stone & Webster document in question until it was shown to him during his OI interview, nor is there any showing that Mr. White had any personal knowledge of the substance or contents of the Stone & Webster documents. See OI Interview of White, July 14, 1987, at 27-29, 43-75 (e.g., "I've never seen this, it was never mentioned to me by Mr. Burns or the other people on that team.")

OI's attribution to Admiral White of knowledge, at the time, of the "Draft results of this [Stone & Webster] assessment," particularly its identification of "a number of quality related problems," flies in the face of the record, as we know it. During his OI interview, Mr. White was shown a compilation of more than 100 pages of documents. Mr. White had never seen the Stone & Webster documents before. Id. After looking at them, Mr. White did determine that the compilation was not sequential; that is, pages were missing, and a number of different documents were together in one heap. See id. at 58.

The OI investigators fully understood that Admiral White was unfamiliar with the documents. Nevertheless, they persisted in asking him numerous questions based upon them. The record that

resulted established that almost all of the statements in the document of particular interest to the investigators were totally unfamiliar to Admiral White.^{10/} As Mr. White observed,

You know, I don't know when that was prepared or who prepared it or what. But I wasn't involved with the marketing and this looks like a marketing document, frankly . . . And I wasn't involved with the marketing. It's not at all strange to me that they wouldn't have come to me with a marketing document. I wouldn't have reviewed it. I had nothing to do with marketing. I refused to be involved with marketing.

^{10/} The following excerpt from the record is illustrative of the lengthy exchange between the OI investigators and Admiral White in which Mr. White reflected a lack of knowledge of the specific technical information contained in the Stone & Webster documents:

MR. MURPHY: If you look at the highlighted areas, if you find any items that are familiar to you, fine, if not, so state it.

MR WHITE: All right. On page 7, paragraph E, Welding Programs (Tab E), it's highlighted, the first three bullets and none of that is familiar to me. On page 8, III(a), second bullet is highlighted and that is --

MR. MURPHY: What is that?

MR. WHITE: "Operating unit planning generally weak. No integrated planning and new construction at Watts Bar," is not familiar to me.

Page 9, paragraph D, labelled "Others", the second and third bullets are highlighted. Am I doing this properly?

MR. MURPHY: Fine.

MR. WHITE: The first one is, "NSRS actively significant. Evident that Q/A not working; no other communication safety valve exists." I've not seen that. I don't understand what it means now.

[Etc.]

OI Interview of White, July 14, 1987, at 59-60.

Id. at 64; see also OI Interview of Wegner, July 22, 1987, at 22 (description of White's disinterest in Stone & Webster marketing efforts).

The OI Report's avoidance of this testimony -- whether deliberate or mistaken -- is further compounded by its use of the Stone & Webster documents to establish knowledge by Admiral White at the time of "quality related problems" at TVA. See OI Report at 32. Mr. White repeatedly explained on the record his perspective at the time. OI ignores this testimony, also. See, e.g., OI Interview of White, July 14, 1987, at 68 ("Whether or not the topic of QA or something else specific was discussed, what I'm saying is I don't recall it. I was focusing, remember, on a couple of things; one being management and the second, learning as much as I could about the commercial industry."); Tr. 68 ("But your question is was quality assurance some big thing? I don't recall it as being What I'm saying is I didn't focus on quality assurance, up here, as the major problem. Clearly I didn't.") OI tries to attribute specific knowledge of QA problems to Mr. White by stating that "WHITE participated in evening briefings with the [Stone & Webster] Assessment team." OI Report at 32. But the knowledge gained by Mr. White at those meetings in no way related to "compliance with Appendix B"; it was a much, much more general, broadbrush knowledge. As Mr. White explained:

MR. MURPHY [the OI Investigator]: Are you familiar with the findings of that particular [Stone & Webster] review?

MR. WHITE: In general, yes.

MR. MURPHY: Could you relate them to us?

MR. WHITE: I have to first say when I say in general, I'm viewing it from my vantage point. Which was really looking at management, leadership, morale, the type of things that you might expect from my previous command positions in the Navy that I would be familiar with the observation of people in that regard.

So I would say that certainly one of the primary impressions that I formed was that there was a lack of what I would call leadership at the top, a lack of adequate direction. There seemed to be very poor morale in a number of locations. I'd say those are the primary impressions that I formed. The other problems, to me, seemed to stem from those overall issues.

★ ★ ★

. . . You know, management being the overall thing, there were problems as I say that stem from that. I'm sure quality assurance would have been one of them. I didn't focus, frankly, that much on those technical issues much due to lack of knowledge of what the standards in industry were.

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MR. MURPHY [the OI investigator]: But you can't get involved in the technical issues. Is that what you're leading up to?

MR. WHITE: Oh, no, I wouldn't say not involved. Perhaps I can be of most help if I talk about -- Well, first let me talk about quality assurance, but let me also talk -- When you say technical issues, let me give you a couple of examples because maybe that's the best way.

We're visiting Sequoyah and discussions were taking place between Mr. Wegner, myself, Mr. Miles and the site director, Mr. Abercrombie. I, frankly, wasn't asking many questions at that point, but for example, Mr. Wegner would look at Mr. Abercrombie and start talking about the 7902's and 7914's. And frankly, I'd pull out a 3x5 card and write 7902 and 7914. So afterwards, I would say, "What were you guys talking about?" Those were technical issues in which they responded and I forget the overall sense of the issue. That's the kind of thing when I say technical issues.

In quality assurance, as an example, I recall at Sequoyah meeting with -- I don't recall the individual's name -- but it was kind of a site Q/A manager and listening to the questioning by both Mr. Miles and Mr. Wegner of that individual about QA. I don't know because I can't climb into Mr. Wegner's mind to know, you know, what real QA issues were coming out. I formed judgment of management issues as a result of that. I formed judgment that this was an individual that had been put in the position at Sequoyah that I viewed based on my knowledge at the time as being responsible for quality assurance at Sequoyah and that I felt that if I were to put him in the place, I would have trained him, I would have sent him to

school, I would have done something to put him in the place. Nothing against the individual. He seemed a competent individual, but I just would have done it differently.

So those are the kind of impressions that I formed when I thought of QA.

* * *

. . . In other words, I don't ever recall in any of those meetings, one of the persons saying, "Look, we've never seen this problem before. This is unique to TVA." It was rather like in the discussions, it would be, "Well, let me tell you what they're doing." And then they would mention some plant that they had seen before or plants and they'd said, "That's what they were doing." And sometimes they would say, "Look, there's a better way to do that. That's an acceptable way, but there's a better way." So it was that kind of thing.

I didn't come away with the impression that there was anything fatal in anything that had been found. Serious means to me, you know, something fatal is about to happen. I never came away with that impression. I came away with quite the contrary, that these problems that they found here existed existed at other places and had been solved at other places.

OI Interview of White, July 14, 1987, at 17-20, 32.

In short, it is grossly inadequate, not to mention outrageously unfair, for OI to attribute knowledge and intent to Admiral White without any evidentiary basis for doing so. It is wholly inappropriate to accuse an individual of wrongdoing in these circumstances, particularly a man with an impeccable record of achievement, public service, and integrity.

ADDENDUM TO ATTACHMENT B

USES OF "PERVASIVE BREAKDOWN" BY NRC

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1. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 N.R.C. 127 (1987) (totality of discrepant situations do not indicate a pervasive breakdown of Applicants' quality assurance program).
2. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Unit 2), DD-86-8, 24 N.R.C. 151 (1986) (in the absence of a pervasive breakdown in communication, the initiation of show cause proceedings is inappropriate).
3. Carolina Power & Light Co. (Shearon Harris Nuclear Plant), LBP-86-11, 23 N.R.C. 294 (1986) (the "pervasive failure" or "breakdown" portion of the test typically is applied in the context of alleged specific QA deficiencies).
4. Commonwealth Edison Co. (Braidwood Station, Unit Nos. 1 and 2), LBP-86-12, 23 N.R.C. 414 (1986) (isolated failure by one contractor does not represent a pervasive breakdown in the Applicant's QA program).
5. Union Electric Co. (Callaway Plant, Unit 1), DD-86-2, 23 N.R.C. 97 (1986) (it is necessary to determine whether the concerns, taken individually or as a whole, constitute a pervasive breakdown in the Licensee's operations quality assurance program).
6. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 N.R.C. 681 (1985) (the requisite reasonable assurance exists if construction errors are corrected, and there is no showing of a pervasive breakdown in QA).
7. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 N.R.C. 59 (1985) (although there were some QA deficiencies, they did not amount to a pervasive breakdown).
8. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 N.R.C. 5 (1985) (breakdown was not so pervasive as to raise a legitimate concern about overall plant safety so as to raise serious doubts about the overall safety of the plant).
9. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), DD-85-9, 21 N.R.C. 1759 (1985) (although the Board found problems in the implementation of the QA program, these problems did not indicate a pervasive failure or breakdown).

10. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), DD-84-16, 20 N.R.C. 161 (1984) (Licensee's QA and QC programs generally satisfy NRC's requirements despite petitioners' contentions that relief is warranted because available evidence demonstrates a continuing and pervasive breakdown in the QA program for design and construction of Catawba).
11. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-84-24, 19 N.R.C. 1418 (1984) (although there are violations of the QA program and Appendix B, there is no pervasive failure or significant breakdown).
12. Washington Public Power Supply System (WPPSS Nuclear Project No. 2), DD-84-7, 19 N.R.C. 899 (1984) (while the Construction Appraisal Team (CAT) found hardware deficiencies, it did not perceive these deficiencies to represent a pervasive management breakdown).
13. Union Electric Co. (Callaway Plant, Unit 1), ALAB-750, 18 N.R.C. 1205 (1983) (specific QA deficiencies are not indicative of any pervasive pattern of QA breakdown).
14. Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 N.R.C. 343 (1983) (in determining whether there has been a "pervasive failure to carry out the QA program" the issue is "whether there has been a breakdown in quality assurance procedures of sufficient dimensions to raise legitimate doubts as to the overall integrity of the facility and its safety-related structures and components").

ATTACHMENT C

COMMENTS ON OI'S TESTIMONY

COMMENTS ON OI'S TESTIMONY

This attachment brings to the Commission's attention several serious errors in OI testimony on this matter which further confirm our concern about the selectivity and misrepresentation of the record in this case. Our review of a March 1, 1988 Commission meeting transcript on the subject of the OI investigation on the Appendix B matter indicates that one of the OI investigators, with the apparent knowledge of the Director of OI, provided materially incorrect information to the Commission. OI also misrepresented the facts in this case in March 21, 1988 testimony before the House Subcommittee on Oversight and Investigations.

The following comments are based on a very limited review of OI testimony on the Appendix B matter. We do not yet know the accuracy of other relevant OI statements.

A. OI Testimony before the NRC

On March 1, 1988, the Director of OI, Mr. Hayes, and Mr. Dan Murphy, one of the OI investigators assigned to this case, testified before the Commission. One of the subjects that was discussed during that meeting was OI's decision to elect to prematurely stop the interview of a witness OI had subpoenaed in February, 1988 because of the presence of "Steve White's attorney" at the interview. Transcript of Commission Meeting of March 1, 1988 at 40 (testimony of Hayes). Mr. Hayes and Mr. Murphy characterized the attorney in question as TVA and Admiral White's attorney. Id. at 38, 40 (Hayes); id. at 41-42 (Murphy). During the discussion which ensued, the following three questions and answers were stated on the record:

COMMISSIONER CARR: And who asked him
[the attorney] to be present?

MR. MURPHY: That question -- we don't
know. The question was asked very clearly --

* * *

COMMISSIONER CARR: But this was a sworn
witness and it was an attorney that the wit-
ness had also requested, even though it was a
TVA attorney?

MR. MURPHY: How the attorney got in-
volved we're not sure. There's a series of
questions --

* * *

COMMISSIONER CARR: You mean you knew before you went that she was going to be there? How did you know that?

MR. MURPHY: We had talked with her. We have contact with --

COMMISSIONER CARR: Well, is she his attorney?

MR. MURPHY: She's a TVA attorney.

COMMISSIONER CARR: Well, is she also his attorney? I understand lawyers have more than one case.

MR. MURPHY: No. In our view we did not think she was his personal attorney.

Transcript of March 1, 1988 Commission Meeting at 42, 43, 44.

In fact, the sworn statement of the subpoenaed witness in this case directly and unequivocally refutes OI's testimony to the Commission. During his interview, in response to Investigator Robinson's questions, the witness, an Ebasco employee, stated:

Q. Now regarding the representation, Mr. Crnich, to your knowledge, is Ms. Bauser your personal representative at this interview?

A. Yes, she is.

Q. Did you select her on your own or was she selected for you?

A. I selected her purely on my own.

Q. Briefly describe how that selection process took place, if you would?

A. Well, I announced or -- I discussed this situation of my being interviewed with our Ebasco attorneys, and in discussing who should represent me I had the choice of choosing the Ebasco attorney, a private attorney somewhere else, and Ms. Bauser.

I selected Ms. Bauser purely on the reason that she was familiar with this whole situation, knew most about it, and I felt very comfortable with her -- I had worked with her at TVA, knew of her, felt very comfortable having her represent me.

OI Interview of John Crnich, Feb. 10, 1988, at 6-7. See also id. at 12 (statement of attorney that she was "unaware of any issue whatsoever that would be a basis for even a potential conflict in the case of Mr. Crnich, much less an actual conflict";) id. at 18 (statement of attorney that, "I do not understand the basis for the objection. Mr. Crnich has expressed both to you and to me his personal desire and his strong desire to have me represent him in this interview. I cannot fulfill or execute my responsibilities as an attorney if I were to agree, as you requested me before the interview began, to leave the room during Mr. Crnich's interview. That would simply be in derogation of my responsibilities as counsel and I am not permitted to do that. So, I want to make it absolutely clear that I want to facilitate your process, Mr. Crnich wants to cooperate with your process, but we cannot do so in a manner which does not provide Mr. Crnich with adequate representation.")

A transcript of the interview in question had been made and Mr. Hayes personally addressed the matter before the Commission. Yet Mr. Hayes remained silently acquiescent to Mr. Murphy's characterization and omission of the facts. That characterization was misleading at best.

B. OI Testimony Before Congress

In April 21, 1988 sworn statements before Congressman Dingell's Subcommittee on Oversight and Investigations, Mr. Hayes again testified about this case, as did several of the OI investigators. See Transcript of Hearing on the MRC's Oversight of the TVA, Before the House Subcommittee on Oversight and Investigations (House Transcript), Apr. 21, 1988. We have not reviewed the transcript of the April 21, 1988 Congressional hearing in detail. However, from our cursory review, it is apparent that OI made a number of misrepresentations about the record in this case.

First, in response to a question from Congressman Dingell, OI Investigator Murphy made the following misstatement:

MR. DINGELL. And Mr. White also stated that Hugh Thompson told him he was satisfied with the contents of the March 20 letter, but

Mr. Thompson told the investigators at OI that he told Mr. White that he was not satisfied with the content and thought it was an inappropriate letter. Is that a fair statement?

MR. MURPHY. That's a fair statement, yes.

House Transcript, Apr. 21, 1988, at 80-81.

But as Attachment B, Comment One (D) made clear, Mr. Thompson could not even recall whether he had the referenced discussion with Admiral White, much less recall the details of that conversation. Mr. Murphy should have pointed this out to Mr. Dingell, and his failure to do so left the record of the hearing on this point incorrect.

In addition, Mr. Mark Reinhart, the OI investigator's technical assistant, stated that TVA had not fully answered the questions posed by the NRC. His conclusion was based, he said, on the sworn statements of Messrs. Huston, Kelly, Wegner and Gridley. According to Mr. Reinhart, "In general, the gentlemen commented that they were [looking] primarily at the program, not its implementation, so they didn't really do an investigation as to how the written program was being put to use at the Watts Bar facility." Id. at 76.

In fact, Mr. Huston testified that the March 20 letter was based not only on a review of the QA program in the areas of identified concern, but also "implementation of that program." OI Interview of Huston, March 4, 1987, at 76. Mr. Kelly stated that "implementation was covered." OI Interview of Kelly, May 12, 1987, at 63-74; see also OI Interview of Kelly, August 18, 1987, at 62 ("I would be unlikely to try to limit it to programmatic, because in my opinion that wouldn't be totally responsive.") Mr. Gridley stated that you have to have a QA program and implement it. "If either parts of those fail then I'm not in compliance with Appendix B." OI Interview of Gridley, Feb. 11, 1987, at 94. Similarly, Mr. Wegner stated,

If you take a given perception, if I go and I just say that the QA records are not very good, that unto itself, if that is all I know, I am not going to be in a position to say whether the Appendix B requirements are being met or not."

OI Interview of Wegner, July 22, 1987, at 128; see also id. at 174-75.

In summary, Mr. Reinhart's testimony before the Subcommittee on Oversight and Investigations concerning the testimony of material witnesses in this case patently misrepresented the truth and misled the Subcommittee.

Finally, we note that in his April 21, 1988 testimony, Mr. Hayes stated, "We feel very confident, Mr. Chairman, that our findings and conclusions are appropriate based upon an objective review of the evidence." House Transcript, Apr. 21, 1988, at 81. At a minimum, Mr. Hayes' confidence was ill-founded. The illustrative comments in Attachment B establish the extraordinary lack of objectivity of OI's findings and conclusions, which were wholly inappropriate.