

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 6656

DOCKETED 07/25/03

BEFORE THE COMMISSION

In the Matter of)	
)	Docket Nos. 50-390-CivP; 50-327-CivP
TENNESSEE VALLEY AUTHORITY)	50-328-CivP; 50-259-CivP
(Watts Bar Nuclear Plant, Unit 1)	50-260-CivP; 50-296-CivP
Sequoyah Nuclear Plant, Units 1 & 2)	50-260-CivP; 50-296-CivP
Browns Ferry Nuclear Plant, Units 1,2 &3))	
)	ASLBP No. 01-791-01-CivP
)	
)	EA 99-234

NRC STAFF'S RESPONSE TO TENNESSEE VALLEY AUTHORITY'S
PETITION FOR REVIEW OF INITIAL DECISION IN LBP-03-10

Dennis C. Dambly
Counsel for NRC Staff

July 25, 2003

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INTRODUCTION

Pursuant to the 10 C.F.R. 2.786(b)(3) of the Commission's regulations, the Staff now responds to "Tennessee Valley Authority's Petition for Review of Initial Decision in LBP-03-10" filed July 16, 2003 (hereinafter "TVA Petition"). As more fully explained below, the Staff does not object to Commission review of the Atomic Safety and Licensing Board's ("ASLB") decision in LBP-03-10.

BACKGROUND

On February 7, 2000, the NRC Staff ("Staff") issued to the Tennessee Valley Authority ("TVA") a Notice of Violation and Proposed Imposition of Civil Penalty ("NOV") in the amount of \$110,000. The NOV was premised upon TVA's non-selection of Mr. Gary Fiser, a former TVA employee, to a competitive position due, in part, to Mr. Fiser's having engaged in "protected activity," as proscribed by 10 C.F.R. § 50.7. Following TVA's continued denial of the violation, on May 4, 2001, the Staff issued an Order Imposing Civil Monetary Penalty. 66 Fed. Reg. 27,166 (May 16, 2001). On June 1, 2001, TVA requested a hearing on the enforcement order and on June 28, 2001, the Board granted TVA's hearing request. Evidentiary hearing sessions were held in

Chattanooga, Tennessee on April 23-26 and 30, 2002; May 1-3, and 6-9, 2002; June 11-14, and 17-20, 2002; and in Rockville, Maryland on September 9-13, 2002. The evidentiary record was closed on October 24, 2002. On June 26, 2003, in the Board's Initial Decision, the majority of the Board found in favor of the Staff that a violation of 10 C.F.R. § 50.7 occurred and sustained the penalty, in part. See *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 & 2; Browns Ferry Nuclear Plant, Units 1, 2 & 3), LBP-03-10, 57 NRC ___, slip op. at 2. On July 16, 2003, TVA petitioned for Commission review of the Board's Initial Decision in LBP-03-10 pursuant to 10 C.F.R. § 2.786(b), to which the Staff now responds.

ARGUMENT

TVA's Petition alleges that the Board's Initial Decision, "makes findings of material fact that are clearly erroneous;" "makes necessary legal conclusions which are without governing precedent and which are contrary to established law;" and "raises substantial and important questions of law, policy, and discretion." TVA's Petition at 1. The Staff does not support TVA's characterization of the initial decision as "factually erroneous" or "without governing precedent", nor its attempts to rewrite the record. Rather, the Staff believes that the Board's findings are clearly supported by the evidence and precedents before it.

In taking the underlying enforcement action, the NRC Staff applied its longstanding interpretation of the regulations. Nevertheless, this case represents the first adjudication of these regulations and involves substantial and important questions of law, policy and discretion -- particularly with respect to the scope of "protected activities" , the standard to be applied in determining whether prohibited discrimination occurred, the applicability of 10 C.F.R. § 50.9 to a discrimination case in which the Staff has proven that all reasons articulated by the licensee are false, and the standards to be applied by a Licensing Board in mitigating a civil penalty in a discrimination case, . According, the Staff would not object to Commission review of LBP-03-10. See 10 C.F.R. § 2.786(b)(4)(iii).

The Staff would note, however, that all the issues, other than the standards applicable to civil penalty mitigation, have been adequately addressed in the record. Both parties have already filed pre-trial legal briefs and proposed findings and responses to proposed findings which more than adequately address any issues which TVA now wishes the Commission to revisit.

CONCLUSION

For the foregoing reasons, the Staff does not believe that Commission review of the Board's Initial Decision in LBP-03-10 is necessary but would not object to such review.

Respectfully submitted,

/RA/

Dennis C. Dambly
Counsel for NRC Staff

Dated at Rockville, Maryland
this 25th day of July, 2003

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)	EA 99-234

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO TENNESSEE VALLEY AUTHORITY'S PETITION FOR REVIEW OF INITIAL DECISION IN LBP-03-010" in the above-captioned proceeding have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), or by electronic mail as indicated by a double asterisk (**) on this 25th day of July, 2003.

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Atomic Safety and Licensing Board Panel
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Administrative Judge **
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