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October 23, 1996

Mr. James Lieberman
Director, Office of Enforcement
Nuclear Regulatory Commission
One White Flint, North
11555 Rockville Pike
Rockville, Maryland 20852-2739

Re: William F. Jocher and Tennessee Valley Authority —
NRC Docket Nos. 50-327, 328

Dear Mr. Lieberman:

At the outset, we wish to inform you that Mr. Jocher and Tennessee Valley Authority (TVA) have reached an oral agreement to settle the two pending DOL actions. TVA counsel is drafting the necessary documents. Having given you that information -- and there has not yet been any other announcement to the press or other agency -- the undersigned still believes that a reply is due to TVA's September 25, 1996, response to the Regional Administrator's September 10, 1996, letter concerning this matter.

By its letter of September 25, 1996, TVA seeks to avoid any enforcement action with respect to its wrongful termination of Mr. Jocher and all that that wrongful termination implied about TVA's view towards and treatment of those employees, who, while engaged in their normal day-to-day activities, report deficiencies in plant operations, plant equipment, and plant procedures. In Mr. Jocher's case, he never considered himself a "whistleblower" or of engaging in activities which senior management would find upsetting. Rather, he made use of the published procedures, just as he has done throughout his long career at other nuclear facilities, to set in motion what he hoped would be corrective actions for long-standing problems in technician knowledge and equipment deficiencies at the Sequoyah Nuclear Plant. Unfortunately for him, the root causes of those deficiencies were senior management inaction or actions throughout the years. As the NRC OI report concludes, "he overtly held senior TVA management responsible for lack of corrective action," and for that, "he was forced to resign by this senior management." As the OI report points out, Mr. Jocher's placement of these long-standing deficiencies in the corrective action process put "historically unfamiliar pressure" on TVA management which was "used to chemistry managers that would accept the blame

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and responsibility for any and all chemistry problems." USNRC Report of Investigation, Case No. 2-93-015 (August 31, 1995), p. 27.

At TVA it is perfectly acceptable to employ the corrective action process to alert the appropriate personnel about a procedural deficiency that can be rewritten, an equipment problem that can be readily corrected by maintenance personnel, or a problem that can be laid at the feet of co-workers or lower level management. As the Jocher case clearly shows, however, and as the NRC OI report concluded, it is wholly unacceptable to place a deficiency in the corrective action process if senior management is implicated. Accordingly, all of TVA's published words, admonitions at meetings, training sessions, etc. do not address the real problem, the root cause of what happened to Mr. Jocher. So long as senior management's self-perceptions, egos and bonuses are at stake, no employee can be sure how his/her use of the corrective action process will be received. When employees are unsure whether they are operating within a system ruled by men rather than well-defined rules, they will always be hesitant to speak up. This is the classic example of a chilling effect on the expression of legitimate concerns. Another insidious aspect of such a system was pointed out by TVA's former corporate RADCON manager, a Ph.D. nuclear physicist now at Lockheed Martin at DOE's Oak Ridge facilities, when he testified that "when problems were reported the tendency was to ask who is the cause of the problem rather than let's go determine how to fix the problem" (DOL ALJ hearing p. 527). That perception, if held by the work force, has a severely chilling effect on use of the corrective action process.

In the foregoing context, we are disappointed that the Regional Administrator's September 10, 1996, letter to TVA unwittingly gave TVA the opportunity to ignore the above issue and to focus its response elsewhere. Thus, TVA exclusively references its actions at Sequoyah Nuclear Plant (SQN), e.g., current trend information for SQN. But Mr. Jocher was employed in a corporate position, not a SQN position when he was terminated. The three TVA managers implicated were all corporate, not SQN, managers. Corporate Human Resources personnel, not SQN, were involved. The SQN budget was controlled from the corporate offices, not from SQN, and it was from corporate, therefore, that the corrections for the problems escalated by Mr. Jocher had to be directed and funded. Unfortunately, the Regional Administrator's September 10, 1996, letter afforded TVA the opportunity of not confronting the root cause, that is, the corporate officers' attitudes towards concerns for which they are responsible.

Not confronting this root cause has been TVA's strategy throughout Mr. Jocher's DOL proceeding. Instead, TVA's efforts have been to circle the wagons tightly around its most senior nuclear management. Mr. Jocher's complaint to the Department of Labor named Mr. Kingsley himself. In Mr. Jocher's view, his demise began with INPO's review of the SQN chemistry program and the inconsistency between Mr. Kingsley's earlier report to the TVA Board of Directors about the health of that program and the INPO report. The SCAR's and other corrective action initiatives which also identified senior management shortcomings, as well as the resulting NRC inquiries and NOV's, sealed his fate. Given these allegations, TVA's litigation strategy was, first, to raise the novel legal

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defense that the Secretary of Labor had no jurisdiction over claims filed by TVA employees (except for preference eligibles) under Section 211; second, to stonewall, i.e., absolutely refuse to make Mr. Kingsley available for deposition notwithstanding the clear import of the allegations -- "As Mr. Marquand has advised you previously, we will not make TVA's chief nuclear officer, Oliver Kingsley, available for deposition" (letter from TVA counsel, Philip J. Pfeifer, to Jocher counsel, Charles W. VanBeke, September 28, 1994); third, to suggest to Mr. Jocher and his counsel on three separate occasions in 1994 that the significant impediment to settlement of his claim of wrongful discharge were the then-pending allegations against Mr. Kingsley. With that lure, Mr. Jocher entered into stipulations which, in essence, released Mr. Kingsley from the case by stipulating that "he will not attempt to prove his allegation. . ." (Stipulation No. 1, November 7, 1994). Not only did settlement not follow, but TVA misrepresented to the NRC the clear language and import of those stipulations by asserting in a December 23, 1994, letter to Mr. Jack R. Goldberg, NRC's Deputy Assistant General Counsel for Enforcement, that Mr. Jocher's stipulation "completely repudiated and disavowed" his allegations with respect to Mr. Kingsley; fourth, Mr. Jocher honored his stipulation by not raising any issues about Mr. Kingsley at the trial notwithstanding that TVA called as a witness adverse to Mr. Jocher, Sam Harvey, who had testified in his deposition that on the day following Mr. Jocher's termination Wilson McArthur, Mr. Jocher's terminating official, told him, "Well, it came all the way from the top. Oliver Kingsley told us to do it." Harvey dep. (Sept. 22, 1994) p. 38. These matters were the subject of my letter to Mr. Goldberg dated January 20, 1995. TVA's response to the Regional Administrator's September 10, 1996, letter shows that the wagons continue to be circled around TVA's senior nuclear management.

With respect to TVA's September 25, 1996, response to the Regional Administrator, it is clear that TVA refuses to accept the conclusions reached by the Wage and Hour District Director, the DOL ALJ, and the NRC OI notwithstanding that each reached its conclusion independently of the others after conducting its own investigation. For TVA to continue to deny the results of those independent investigations, and to rely on its own in-house OIG investigation, reveals senior management's refusal to admit its own failings. In seeking to deflect or wholly avoid responsibility, TVA asserts that management's only failure was to not involve its human resources personnel in the ouster of Mr. Jocher. Indeed, TVA asserts that such was "a key failing." Anyone who reads the TVA OIG report, the depositions of Mr. Pope and Mr. Easley, and the DOL trial transcript can readily see that the TVA Nuclear Human Resource personnel were involved. Not only were they involved for several weeks prior to the termination, but Mr. Pope, the corporate Human Resources manager and Mr. Easley's supervisor, sought advice from the Office of the General Counsel in the days immediately prior to Mr. Jocher's termination! Obviously, the HR personnel were involved but were taking their directions from the most senior nuclear management and not exercising any independent judgment or heeding OGC concerns. They, too, just followed orders. As the sands shifted with the progress of the case, so did their testimony.

Mike Pope, Human Resources Manager, Nuclear Central Office and Easley, HRO who was involved in Jocher's resignation, stated they were not aware of any

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documentation to support Jocher's termination.

TVA OIG report (March 17, 1994) p. 19 fn. 15.

Q. Did Wilson McArthur furnish you any kind of documentation regarding why he was wanting to have Jocher terminated or resign — ask him to resign?

A. He didn't furnish me any documentation, no.

* * * *

Q. You didn't ask to see any kind of written documentation or service reviews, notes, anything like that?

A. I didn't, no.

* * * *

Q. What did legal say when you spoke with Maureen Dunn [TVA Assistant General Counsel for Human Resources, Labor and General Corporate] about this issue?

A. Well, she expressed concern over the amount of documentation that we had. I guess she showed the same concern that I did that we didn't, you know, that we weren't aware of exactly how much documentation we had to support the counseling sessions. We worked through that. . .

(Taped August 12, 1993 interview of Mike Pope by TVA OIG investigators)

Thirteen months later, Mr. Pope testified in his deposition with respect to a meeting with Mr. McArthur in preparation for Mr. Jocher's termination:

A. We reviewed — I am trying to recall the documentation that we reviewed. We went — And at that point, I involved Mr. Easley. And, as I recall, we went to Mr. McArthur's office and reviewed some documentation, but what the specifics were, I am not sure, but there was some documentation there regarding some counseling sessions and so forth. (Pope Dep. at 15-16)

Over those thirteen months, Mr. Pope had been co-opted into the cause.

Mr. Easley testified at his deposition that he had become involved several weeks prior to the

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termination meeting he attended with Mr. McArthur and Mr. Jocher, and that there had been three drafts of the termination and resignation letters prepared by he and Mr. Pope, and that those letters had been coordinated with the Office of the General Counsel by Mr. Pope. Easley dep. (September 22, 1994) at 18-20, 33-34, 56. In short, TVA's shield, i.e., the we-should-have-involved-human-resources defense, is a sham and is asserted for the purpose of protecting senior nuclear management.

The other prong of TVA's defense to any enforcement action is that TVA has "made significant progress in improving the workplace environment to a point where employees overwhelmingly feel free to raise concerns." As evidence, it points to face-to-face, non-anonymous surveys conducted by management's investigative arm, the TVA OIG. Evidence that TVA's employees believe that its OIG is merely another management tool is found in TVA's own reactions. In internal communications with its employees, TVA refers to its OIG as "TVA's independent OIG," not "TVA's OIG." The distinction is not subtle. TVA is trying at every opportunity to have its employees believe that the OIG is independent of management in the face of widespread, endemic skepticism. This skepticism is engendered by the fact that the OIG is housed in the same building as TVA's senior management; OGC attorneys and staff personnel have been promoted into OIG positions; OIG personnel receive TVA paychecks and bonuses; and OIG personnel get promoted into TVA management positions of high responsibility, e.g., a former IG is TVA's highest executive officer, another is chief of the TVA Police. One interesting example of the assertion of OIG independence was having a high level OIG official publically reject a cash bonus that was also being awarded to his non-OIG management peers. Of course, the amount of cash bonus was then credited to his tax deferred retirement account. Given his tax bracket, his income and his age, he actually came out ahead financially by his grandstanding to perpetuate the OIG independence myth. TVA employees are also aware of the many investigations which have targeted rank and file employees and forced their terminations. They are not aware of any investigations made of management activities. Thus, it is no wonder that TVA fiercely relies on its "independent" OIG surveys in order to dissuade the NRC from a having truly independent review of employee attitudes made. If the NRC wants a true picture of TVA employee attitudes, it must conduct a survey wholly apart from TVA control. While TVA trumpets that it has initiated "significant actions to improve the workplace environment and foster an atmosphere where employees and contractors feel free to raise concerns," the only evidence of whether such programs perform as expected are TVA OIG face-to-face interviews. Does TVA not want a truly independent evaluation? The NRC now has the opportunity to force such an evaluation if it maintains control over the survey, the contractor, the methodology, even payment which it can then backcharge to TVA. As a citizen, I hope such a survey validates TVA's assertions. As an attorney who is sought out by many TVA employees for legal advice, I do not believe TVA's hopes will be validated. It's time to find out one way or the other. Indeed, it should be part of NRC's mission.

Finally, in trying this case, it was most troubling to see how often and how pervasively TVA's

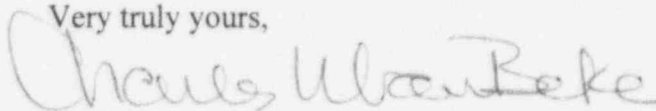
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witnesses had changed their testimony from their initial DOL interviews, to their TVA OIG interviews, to their depositions, and to their trial testimony. Some, but not all, are referenced in the NRC OI report.

Very truly yours,



Charles W. Van Beke

For the Firm

CVB/gw

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