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**Subject: Resolving Questions about Statutory Duties to TVA Employees.**

Dear Mr. McBride:

I write regarding your duty and that of Tennessee Valley Authority (TVA's) board and TVA CEO to "take any action.....necessary" to ensure employment at TVA embodies the Merit System Principles.<sup>1</sup> I would appreciate you taking the time from your other important duties to consider the important issues raised herein.

I often represent federal employees and/or whistleblowers, including those at TVA. It appears there is some controversy regarding whether chapter 23, "Merit Systems Principles" of Title 5 of the U.S. Code applies at TVA, particularly the definitions of "merit system principles" and "prohibited personnel practices." (PPPs) According to a 1989 "special study" of TVA by the Merit Systems Protection Board (MSPB), the definitions of "merit system principles" apply at TVA. The MSPB special study did not explicitly state whether the definitions of PPPs apply, but given the close statutory relationship between the merit system principles and PPPs as defined, it strongly appears to the reasonable mind, they do.<sup>2</sup> If so, TVA employees have the right, by 5 U.S.C. § 2302(b)(8)(B), to make whistleblower disclosures to the Office of Special Counsel, as described in 5 U.S.C. § 1213. Nonetheless, I understand TVA takes the position it is implicitly excluded from every aspect of the Civil Service Reform Act of 1978 (CSRA), unless explicitly included, and as such TVA employees cannot access the secure, independent and confidential disclosure channel at the Office of Special Counsel (OSC). OSC secure, independent and

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<sup>1</sup>See 5 U.S.C. § 2301(c)(2). TVA, as a government corporation, is largely outside the prohibited personnel practice (PPP) jurisdiction of the Office of Special Counsel (OSC), however the responsibility to ensure merit system integrity applies to the Board and CEO of TVA. Agency heads within OSC's PPP jurisdiction have the duty to "prevent PPPs," under 5 U.S.C. § 2302(c).

<sup>2</sup>This 1989 MSPB "special study" is available at <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=308201&version=308602&>

confidential whistleblower disclosure mechanism is important particularly for disclosures containing information that cannot be publicly disclosed. I respectfully believe TVA's reasoning is faulty and ask for your assistance. Whatever the merit of TVA's reasoning with respect to it perceived exclusion from other chapters of Title 5,<sup>3</sup> this reasoning should not apply to Chapter 23, which explicitly excludes TVA from section 2302, subsections (a)(2), (c), and (d) but not (b). According to MSPB, TVA is included in the "every Executive agency" language of section 2301(a)(1). Thus, the definitions of "merit system principles" apply at TVA. If this is the case, TVA should not claim the definitions of "PPPs" in 2302(b) do not apply at TVA, given the requirement of 2302(a)(1) they apply throughout Title 5 and the TVA Board and CEO should openly accept their duty to "take any action...necessary" to ensure TVA embodies the merit system principles, per 2301(c)(2).

I respect TVA and its mission and history. However, it would appear that TVA is in partial conflict with the MSPB special study and the language of the CSRA. For the TVA Board and CEO to be in a position to claim compliance with their statutory duty to "take any action ... necessary" to ensure TVA embodies the merit system principles, then the following three conditions must exist:

- 1) TVA employees know their right and responsibility - and can discharge it - to bring forward concerns, particularly ones containing information prohibited from public disclosure, in all legally authorized ways, including via OSC;<sup>4</sup>
- 2) TVA employees are adequately protected from reprisal and other PPPs, and<sup>5</sup>
- 3) There is an objective basis to claim conditions 1 and 2 exist.

Are the three minimal conditions of compliance in place at TVA? I suggest not for reasons largely outside the control of TVA, given the failure to properly implement the CSRA or the follow-up Whistleblower Protection Act of 1989 (WPA) that strengthened the CSRA. On behalf of federal employees, I respectfully contend that heads of executive agencies and federal corporations like yourself, aggressively support the full and proper implementation of the CSRA/WPA federal merit and whistleblower protection system, given your duty to "take any action....necessary," by requesting the Office of Legal Counsel of the Department of Justice to

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<sup>3</sup>Title 5 codifies the CSRA.

<sup>4</sup>OSC is the only disclosure channel having a mandate to provide confidentiality to the concerned employees. OSC can direct TVA to investigate the concern in a way that keeps the concerned employee involved and mandates OSC issue a publicly available report about the TVA investigation to the President and Congress, *see* 5 U.S.C. § 1213

<sup>5</sup>As a result of the 1989 MSPB "special study" of TVA, in 1994 Congress gave OSC jurisdiction for the whistleblower reprisal type PPP at TVA. Last year Congress extended this to both reprisal type PPPs (i.e. reprisal for making a protected disclosure and reprisal for engaging in a protected activity), but OSC lacks jurisdiction at TVA for all other types of PPPs of which there are 10.

resolve the issues of the applicability of chapter 23 at TVA. This exercise is not a mere academic one. From representing federal employees and understanding the legal framework that exists but is largely without implementation, I respectfully believe revitalizing the CSRA/WPA framework for the protection of the federal merit system will promote public health and safety and ensure a more effective federal government. Please contact me with any questions. Thank you.

Sincerely,

Loring Justice

