



**Tennessee Valley Authority
Office of the Inspector General**

Report of Administrative Inquiry

**INQUIRY INTO ALLEGED
VIOLATION OF THE
GOVERNMENT IN THE SUNSHINE ACT
OIG FILE NO. 17A-14875**



Tennessee Valley Authority
Office of the Inspector General

EXECUTIVE SUMMARY

INQUIRY INTO ALLEGED VIOLATION OF THE GOVERNMENT IN THE SUNSHINE ACT OIG FILE NO. 17A-14875

This investigation was initiated after the Tennessee Valley Authority (TVA) Office of the Inspector General (OIG) received a complaint alleging the TVA Board of Directors (Board) failed to give proper notice as required by the Government in the Sunshine Act (Sunshine Act) when the Board selected William D. (Bill) Johnson as TVA's President and Chief Executive Officer (CEO).

Our investigation found the following:

- The Sunshine Act requires public meetings by an executive agency be open to the public. However, as a legal matter, the prevailing view as indicated by the District of Columbia, U.S. Appellate Court, is that notational voting does not constitute a meeting, and it does not constitute a violation of the Sunshine Act. Furthermore, because notational voting does not constitute a meeting as described in the Sunshine Act, notice is not required.
- In selecting a CEO, the Board decided to use the notational process to protect the privacy of applicants and to address the difficulties of obtaining a quorum at that time.
- The evidence developed by our investigation shows the Board followed notational procedure by not discussing the candidates' qualifications or otherwise deliberating with one another about the selection. Board members voted separately.
- Because the Sunshine Act does not prohibit the notational procedure and the evidence demonstrates that the Board properly used that procedure, the Board did not violate the Sunshine Act.



Tennessee Valley Authority
Office of the Inspector General

April 26, 2013

William D. Johnson, WT 7B-K

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INVESTIGATIVE BACKGROUND

We have completed our investigation of an allegation regarding the Board's compliance with the Sunshine Act. Specifically, the complainant alleged TVA failed to notify the public of the meeting when the Board voted to select Mr. Johnson and that this constituted a violation of the Sunshine Act found at Title 5, United States Code (USC) § 552b, and as implemented at TVA by Title 18, Code of Federal Regulations (CFR), §§ 1341-1348.

Our investigation included the review of relevant documents and interviews of Board members, TVA staff, and the consultant who assisted the Board in the CEO hiring process. Additionally, the OIG legal staff conducted an independent legal review of the Sunshine Act and notational process.

The evidence supporting our findings is summarized below.

CANDIDATE SELECTION

When Tom Kilgore, former TVA President and CEO, announced he would retire at age 65, the Board started the process of finding a replacement. In July 2012, the Board hired a consultant, Albert L. McAulay, Jr., to conduct a search for candidates to fill the CEO position. Numerous candidates were identified by Mr. McAulay, and ultimately nine candidates were presented to the TVA Board to be interviewed.

A primary concern of the Board upon entering the selection process was to maintain the privacy interests of the candidates. Making the candidates' identities known might jeopardize their current jobs or jobs to which they may have applied. To address the interest in maintaining the confidentiality of the candidates while complying with all laws, regulations, and policies applicable to Board meetings, the Board received advice from the TVA Office of General Counsel (OGC).

Candidates were interviewed by the Board (under the direction of Mr. McAulay) in late September and early October 2012. Not all Board members were present during all the interviews. In an effort to comply with the Sunshine Act, the Board was advised by OGC to not discuss his or her views or impressions of a candidate with other Board members. The evidence indicates that no such discussions occurred.

Board members' impressions of the candidates were given to Mr. McAulay. Through these impressions and one-on-one consultations with Board members, Mr. McAulay narrowed the number of candidates to four and then to one – Mr. Johnson. Bill Sansom, Chairman of the TVA Board; Janet Herrin, TVA Chief Administrative Officer; and Mr. Johnson then discussed compensation. This meeting provided a basis for a future agreement on compensation, and it was decided the Board should vote on whether to hire Mr. Johnson as CEO.

VOTING PROCESS

The Board opted to hold a notational vote. Notational voting refers to the process whereby a governing body votes individually and separately as opposed to a vote taken at a meeting. According to the District of Columbia, U.S. Appellate Court, in the case of *Railroad Commission of Texas v. United States* (1985, App.D.C.) (246 U.S. App.D.C. 352, 763 F.2d 221), the Sunshine Act does not proscribe notational voting. The Court stated that the “Sunshine Act does not require that meetings be held in order to conduct agency business; rather, that statute requires only that, if meetings are held, they be open to the public...” Additionally, a meeting is defined in the Sunshine Act as “the deliberations of at least the number of agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business...” Because notational voting does not involve deliberations, it is not a meeting under the Sunshine Act; therefore, public notice is not required.

Board members said notational voting was chosen for several reasons. The first was, as stated earlier, to maintain the privacy of the candidates. A second reason was it was believed Mr. Johnson had other job opportunities and that time was of the essence. Finally, it was uncertain whether a quorum of Board members could attend a meeting. A quorum of the Board requires the presence of five members and, at that time, there were only six appointed Board members, making it difficult to ensure a quorum. A Board member acknowledged that for public perception and political reasons, it was preferable to use a more open decision-making process, but circumstances dictated using the notational process.

The notational vote was taken on November 1, 2012. Board members confirmed they followed the TVA Board Practice governing notational approvals. Votes were cast individually, and there is no evidence deliberations occurred. The vote was unanimous in selecting Mr. Johnson as the CEO. The TVA Board Practice – Notational Approvals and the tally sheet are attached as appendices to this report. The Board later confirmed the vote in a public meeting.

FINDINGS

The Sunshine Act requires public meetings by an executive agency be open to the public. However, the District of Columbia, U.S. Appellate Court, has held that notational voting does not constitute a meeting and is not proscribed by the Sunshine Act.

In selecting a CEO, the Board decided to use the notational process in order to protect the applicants' privacy and to address the difficulties of obtaining a quorum at that time. The Board followed notational procedure by not discussing the candidates' qualifications or otherwise deliberating with one another about the selection. Board members voted separately.

Notational procedure is not prohibited by the Sunshine Act, and the Board followed that process. Thus, the evidence indicates the Board did not violate the Sunshine Act.

This report has been designated "TVA Restricted" in accordance with TVA-SPP-12.02, TVA Information Management Policy. Accordingly, it should not be disclosed further without the prior approval of the Inspector General or his designee. In addition, no redacted version of this report should be distributed without notification to the Inspector General of the redactions that have been made.



John E. Brennan
Assistant Inspector General
(Investigations)
ET 4C-K

JEB:MSW
cc: Peyton T. Hairston, Jr., WT 7B-K
Ralph E. Rodgers, WT 6A-K
OIG File No. 17A-14875

TVA BOARD PRACTICE – NOTATIONAL APPROVALS

Background

Section 1.7 of the **Bylaws of The Tennessee Valley Authority** provides that the TVA Board may take action by a majority vote of all members, at times other than during a Board meeting, by notational approval by individual Board members, subject to the following requirements:

- Personal notice of the notational item is provided to individual Board members by electronic mail or as otherwise specified by individual Board members;
- Board members have at least seven calendar days within which to submit their individual votes, unless the Board Chairman specifies an earlier deadline (but in no event fewer than three calendar days).

By adopting this **TVA Board Practice**, the TVA Board wishes to set forth supplemental policies, processes, and criteria to govern the notational approval process and to guide and direct management, Board committees, and individual Board members as to how requests for notational approvals are to be handled.

Guiding Principle

The notational approval process is to provide a means by which the Board may take timely and appropriate action on matters between Board meetings. This notational approval process must be carried out in a way that is fully consistent with the Board's responsibility to exercise careful and prudent oversight and their ability to lead TVA with integrity and open and transparent accountability.

Criteria for Notational Approvals

To be eligible for notational consideration by Board members, a proposed action item must meet one or more of the following criteria. The Board Approval Memorandum which transmits any action item for notational approval must designate one or more of these criteria as being applicable and must provide appropriate supporting information to inform the Board as to the basis for such applicability.

1. Time Sensitive

- a. Deadline -- *Example*: An externally-established deadline for TVA action will expire before the date of the next scheduled Board meeting, with no reasonable opportunity for obtaining an extension.
- b. "Fleeting Opportunity" -- *Example*: An uncertain amount of time exists during which TVA will have a chance to take advantage of an opportunity before it is seized by another or otherwise will cease to exist.

- c. Negative Cost/Value Trend -- *Example*: The passage of time will likely cause TVA's costs under the action item to increase or the value to TVA of approving the action item to decrease.

2. Confidential

- a. Individual Privacy -- *Example*: Action item includes personal information about one or more individuals, which either is protected under the Privacy Act, is otherwise exempt from disclosure under the Freedom of Information Act (FOIA), or is otherwise considered sensitive.
- b. Other's Proprietary/Confidential Information -- *Example*: Action item includes information that is proprietary/confidential information of a party other than TVA which is either prohibited from disclosure under the Trade Secrets Act or exempt from disclosure under FOIA. This criteria also would apply to TVA's annual budget submissions to the Administration, because public disclosure of the contents of such submissions is routinely prohibited by order of the President until the President's Budget is submitted to Congress, as well as being exempt from disclosure under FOIA.
- c. TVA's Proprietary/Confidential Information -- *Example*: Action item includes information that TVA considers to be "business sensitive" or to be proprietary/confidential and which would be otherwise exempt from disclosure under FOIA.

3. Not of Material Public Interest

Example: Action item involves subject matter which can be reasonably considered to not be of material interest to members of the public, and consideration and approval of such action item would not be an efficient use of Board time during meetings. This will often be an approval item that is considered routine and noncontroversial, but for some reason (e.g., statutory) requires action by the Board.

Personal Notice to Individual Board Members

The Chief Executive Officer, in consultation with the appropriate Committee Chair when applicable, will assure that a process is in place under which all Board members, to the extent feasible, will be personally notified by nonelectronic or other effective means when any action item which is potentially significant or controversial is being provided to them individually for notational approval.

Pre-voting Review Period

For each action item being proposed for notational approval by the Board, the Chair of the Committee proposing the approval, or the Chairman of the Board in the absence of a Committee recommendation, shall specify the number of calendar days during which individual Board members will have the opportunity to review the proposed action item and make inquiries and/or comments in advance of the date on which notational voting will commence.

In the absence of such a specification, the date on which voting shall commence on a notational approval action item shall be three calendar days after the day on which information on that action item is provided to the individual Board members.

Openness and Transparency

In a manner consistent with the requirements of applicable Federal law, the Chief Executive Officer shall assure that disclosure to the public is made of those action items that have been notationally approved by the Board in at least the following two ways:

1. **Board Meeting Agendas** -- Each action item notationally approved by the Board between Board meetings shall be disclosed and appropriately identified as an "Information Item" on the agenda for the upcoming Board meeting, which is required by the Government in the Sunshine Act to be published in the *Federal Register* at least one week in advance of the meeting.

The Chief Executive Officer, in consultation with the appropriate Committee Chair when applicable, shall further assure that TVA is prepared to respond, in a manner consistent with the limitations of applicable Federal law, to public inquiries about any notational approval item that appears as an "Information Item" on the agenda for a Board meeting.

2. **Board Meeting Minutes** -- Each action item notationally approved by the Board between Board meetings shall be disclosed and appropriately identified in the minutes of the next public Board meeting, which minutes shall be publicly available.

Approved by the Board of Directors of the Tennessee Valley Authority, November 30, 2006.

NOTATIONAL BOARD APPROVAL
(Appointment of New CEO)

WHEREAS the Board has the responsibility under the TVA Act to appoint a person to serve as the Chief Executive Officer (CEO) of TVA taking into consideration relevant qualifications and expertise for the position of CEO as set forth in the TVA Act; and

WHEREAS the Board has engaged in an extensive and thorough nationwide search to identify qualified candidates for the position of CEO of TVA following the announcement by Tom Kilgore, TVA's current President and CEO, of his intended retirement;

BE IT RESOLVED, That the Board hereby approves the appointment of William D. Johnson as President and CEO of TVA effective January 1, 2013, with terms and conditions of employment, including compensation, as agreed to and set forth in the attached offer letter;

RESOLVED further, That the members of the Board, each being familiar with the purposes of this Board action, approve dispensing with formalities regarding Board notification and a pre-voting review period provided for in the TVA Board Practice, Notational Approvals, for this action.

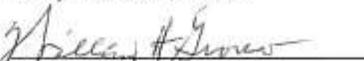
APPROVED BY THE INDIVIDUAL BOARD MEMBERS:


William B. Sansom, Chairman

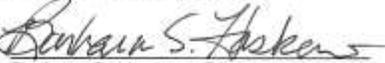
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Date

Marilyn A. Brown, Director

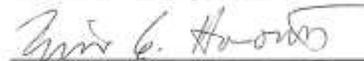
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William H. Graves, Director

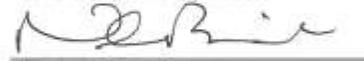
11/1/2012
Date


Barbara S. Haskew, Director

11/1/2012
Date


Richard C. Howorth, Director

11/1/2012
Date


Neil G. McBride, Director

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APPROVED BY THE INDIVIDUAL BOARD MEMBERS:

William B. Sansom, Chairman

Date

Marilyn Brown

Marilyn A. Brown, Director

11/1/12

Date

William H. Graves, Director

Date

Barbara S. Haskew, Director

Date

Richard C. Howorth, Director

Date

Neil G. McBride, Director

Date