

RAS 3268

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

DOCKETED 08/01/01

SERVED 08/01/01

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. Richard F. Cole
Ann Marshall Young

In the Matter of

TENNESSEE VALLEY AUTHORITY

(Watts Bar Nuclear Plant, Unit 1;
Sequoyah Nuclear Plant, Units 1 & 2;
Browns Ferry Nuclear Plant, Units 1, 2 & 3)

Docket Nos. 50-390-CivP; 50-327 CivP;
50-328-CivP; 50-259-CivP;
50-260-CivP; 50-296-CivP

ASLBP No. 01-791-01-CivP

EA 99-234

August 1, 2001

PREHEARING CONFERENCE ORDER
(Telephone Conference, 7/19/01)

This proceeding concerns a May 4, 2001 Order Imposing Civil Monetary Penalty of \$110,000, against the Tennessee Valley Authority (TVA or Licensee), based on the claimed violation by TVA of 10 C.F.R. § 50.7 for allegedly discriminating against a former TVA employee (Mr. Gary L. Fiser) for engaging in "protected activities." On July 19, 2001, the Atomic Safety and Licensing Board in this proceeding conducted a telephone prehearing conference (Tr. 1-61).¹ Participating, in addition to the Administrative Judges from the Atomic Safety and Licensing Board, were Thomas F. Fine, Esq., John E. Slater, Esq., Brent R. Marquand, Esq.,

¹The conference was announced in the Licensing Board's Memorandum and Order (Granting Request for Hearing and Scheduling Telephone Prehearing Conference), dated June 28, 2001 (unpublished), as supplemented by the Licensing Board's Order (Participation in 7/19/01 Telephone Prehearing Conference), dated July 10, 2001 (unpublished). As requested in the June 28, 2001, Memorandum and Order, TVA and the Staff each provided the Licensing Board, prior to the conference, with statements of facts and issues and copies of pertinent background documents. See letter (with enclosures) from NRC Staff to Licensing Board, dated July 10, 2001 (NRC Response); letter (with enclosures) from TVA to NRC, dated July 16, 2001 (TVA Response).

and Barbara S. Maxwell, Esq., for TVA; Dennis C. Dambly, Esq., Susan S. Chidakel, Esq., and Jennifer M. Euchner, Esq., for the NRC Staff; Carolyn F. Evans, Esq., Regional Counsel, NRC Region II; Nicholas D. Hilton, of the NRC Office of Enforcement; and Lee S. Dewey, Esq. and Michelle R. McKown, Esq., of the Atomic Safety and Licensing Board Panel (ASLBP).

Following is a description of matters discussed and rulings made during the conference:

1. Discussion of Legal Issues for Possible Briefing.

The issues of the proper interpretation of the term “protected activities” under 10 C.F.R. § 50.7, of what alleged protective activities are at issue in this proceeding and whether the filing of a Department of Labor complaint is sufficient on its own to constitute a protected activity, and of the proper application of certain caselaw on the “dual motives” principle in employment cases, were discussed. The parties agreed that the Staff bears the burden of going forward and the burden of proof in the case; that in a civil-penalty proceeding of this type the maximum remedy available is the proposed civil penalty of \$110,000; and that, because this is a de novo proceeding, the decision in the case will be based solely on the allegations in the Notice of Violation and the Order Imposing Civil Monetary Penalty, and on the evidence presented at the hearing. See Tr. 12, 16, 47, 56. The parties will attempt to resolve all differences between them on any legal issues that exist or may arise in the case, and will advise the Board at the next prehearing conference of any remaining differences and whether, in their view, briefing of such issues will be necessary or useful. Tr. 38-39.

2. Discovery Schedules.

By letter dated July 17, 2001, TVA and the Staff jointly proposed a discovery schedule under which the discovery period would start on August 13, 2001 and end on December 14, 2001, and the final date for dispositive motions (i.e., motions for summary disposition) would be February 1, 2002. In response to inquiries by the Licensing Board concerning the length of the

proposed discovery period, TVA indicated that it expected to take numerous depositions following a period of written inquiries, and that some of the depositions would likely take place in areas far from Tennessee—in particular, that of a former (retired) TVA employee currently in ill health residing in Salt Lake City, Utah. See Tr. 33-35. The Licensing Board ruled that discovery could start immediately but otherwise adopted the discovery period proposed by the parties that terminated on December 14, 2001. (The parties indicated that near-term discovery schedules could be modified to accommodate the availability of various counsel during planned vacation schedules.) See Tr. 40-41. The need and appropriate schedule for dispositive motions, as well as any further discovery issues, will be addressed at the next prehearing conference. See Tr. 58.

3. Subpoenas. The Chairman of this Licensing Board is authorized to issue subpoenas for witnesses or documents, which the parties advised they would seek during discovery. See Tr. 50- 52; 10 C.F.R. §§ 2.718(b), 2.720, 2.721(c). The Chairman will issue such subpoenas in this proceeding, upon a showing by the requesting party that the witness or evidence sought has “general relevance” to this proceeding. See 10 C.F.R. § 2.720(a). Parties wishing to obtain subpoenas shall contact the Board Chairman.

4. Hearing. The Licensing Board ruled that, assuming a hearing is necessary, it will be held in the Chattanooga, Tennessee area, where most of the expected witnesses reside, at a time and place to be announced. See Tr. 47-49. At the hearing, formal Federal Rules of Evidence will not be applied, but such rules may be used for guidance. See Tr. 27-28. Under NRC rules, evidence that is “relevant, material and reliable,” and “not unduly repetitious” is admissible. 10 C.F.R. § 2.743(c). Hearsay testimony is thus admissible in a proceeding of this type, if it meets the foregoing standard.

The parties agreed that, in an enforcement proceeding of this type, where the credibility of witnesses may be in question, witnesses should present their testimony orally, and written prepared testimony thus would not be appropriate. See 10 C.F.R. § 2.743(b)(3). The Licensing Board ruled that testimony in this proceeding would be live testimony. See Tr. 54-56. Prior to the hearing, however, to accommodate the need to estimate the length of time required for the evidentiary hearing sessions, the parties are directed to provide lists of their proposed witnesses (including a brief exposition of the subject matter of the testimony, if available) and of documents on which they propose to rely. The schedule for such filings will be established at a future prehearing conference.

5. Future Prehearing Conference. A telephone prehearing conference has tentatively been scheduled for Wednesday, November 14, 2001, at a time to be announced. The Board will provide further notification of the time and date of such conference at a future time. During that conference, the Board will review, inter alia, the above legal issues, the status of discovery, whether settlement negotiations have been undertaken, and potential hearing schedules. See id. at 39, 56-59.

6. Settlement. The Licensing Board noted that, in proceedings of this type, the Commission encourages settlement. See 10 C.F.R. §§ 2.203, 2.205(g). The Board encouraged the parties to explore the possibility of settling all or part of the case and to report back on its likelihood at the November 14, 2001 prehearing conference. See Tr. 56-57.

7. Service Requirements. Under 10 C.F.R. 2.712(c), the official served copies of pleadings or documents may be served by first-class mail. As noted by the Board in its June 28, 2001 Memorandum and Order, additional service upon the Board and parties by e-mail is also encouraged (preferably in WordPerfect). Where service by e-mail is employed, a copy of

each pleading should also be served upon the Secretary at HEARINGDOCKET@nrc.gov. See
Tr. 52-54.

* * *

This Prehearing Conference Order is being issued pursuant to the requirements of 10
C.F.R. § 2.752(c). Objections to this Order may be filed by a party (including the Staff) within 5
days of service (by first-class mail).

It is so ORDERED.

For the Atomic Safety and Licensing Board

/RA/

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 1, 2001

[Copies of this Prehearing Conference Order have been transmitted this date by e-mail to
counsel for each of the parties.]

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
TENNESSEE VALLEY AUTHORITY) Docket Nos. 50-390-CIVP,
) 50-327/328-CIVP and
(Watts Bar Nuclear Plant, Unit 1;) 50-259/260/296-CIVP
)
Sequoyah Nuclear Plant, Units 1 & 2; and)
)
Browns Ferry Nuclear Plant, Units 1, 2 & 3))
(Order Imposing Civil Monetary Penalty))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB PREHEARING CONFERENCE ORDER (TELEPHONE CONFERENCE, 7/19/01) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Charles Bechhoefer, Chairman
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Richard F. Cole
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Ann Marshall Young
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Dennis C. Dambly, Esq.
Susan S. Chidakel, Esq.
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Mark J. Burzynski, Manager
Nuclear Licensing
Tennessee Valley Authority
1101 Market Street
Chattanooga, TN 37402-2801

Thomas F. Fine, Esq.
Assistant General Counsel
Office of the General Counsel, ET 10A-K
Tennessee Valley Authority
400 W. Summit Hill Drive
Knoxville, TN 37902

Docket Nos. 50-390-CIVP
50-327/328-CIVP and
50-259/260/296-CIVP
LB PREHEARING CONFERENCE ORDER
(TELEPHONE CONFERENCE, 7/19/01)

[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 1st day of August 2001