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NUCLEAR REGULATORY COMMISSION

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

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Docket Nos: 50-390-CivP, et al.

ASLBP No: 01-791-01-CivP

Location: (Telephone Conference)

Date: Thursday, July 19, 2001

Work Order No.: NRC-338

Pages 1-61

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

PRE-HEARING CONFERENCE

- - - - - X

: Docket Nos.

IN THE MATTER OF: : 50-390-CivP;

TENNESSEE VALLEY AUTHORITY : 50-327-CivP;

(Watts Bar Nuclear Plant, : 50-328-CivP;

Unit 1; Sequoyah Nuclear : 50-260-CivP;

Plant, Units 1 & 2; : 50-296-CivP;

Browns Ferry Nuclear : ASLBP No.

Plant, Units 1,2 & 3 : 01-791-01-CivP

: EA 99-234

- - - - - X

Thursday, July 19, 2001

Via telephone conference call

The above-entitled matter came on for
hearing, pursuant to notice, at 10:00 a.m.,

BEFORE:

CHARLES BECHHOEFER, Chairman

RICHARD F. COLE, Administrative Judge

ANN MARSHALL YOUNG, Administrative Judge

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Appearances (continued)

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P-R-O-C-E-E-D-I-N-G-S

10:03 a.m.

JUDGE BECHHOEFER: This is a Pre-Hearing Conference in the case involving the Tennessee Valley Authority, proposed civil penalty. TVA filed a request for a Hearing which the Board granted. Let me introduce the board members first. My name is Charles Bechhoefer. I'm the Chairman. Identify yourself.

JUDGE COLE: This is Richard Cole. I'm an environmental technical member.

JUDGE YOUNG: Hi. This is Ann Marshall Young. I'm one of the Lawyer Administrative Judges.

JUDGE BECHHOEFER: And with us here also are Michele McKown and Lee Dewey, who are counsel who work for the Atomic Safety and Licensing Board Panel. Would other people on the line also identify themselves now, for the record.

MS. EVANS: This is Carolyn Evans. I'm regional counsel here in Region II.

DENNIS DAMBLY: And also from the NRC, this is Dennis Dambly with the Office of General Counsel, and I have with me, Susan Chidakel from the Office of General Counsel and Jennifer Euchner, from the Office of General Counsel, and Nick Hilton, from the Office of Enforcement.

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1 MR. FINE: This is Thomas Fine from the
2 Tennessee Valley Authority. I have with me the trial
3 team of Brent Marquand, John Slater and Barbara
4 Maxwell.

5 JUDGE BECHHOEFER: Okay, as we announced
6 in an earlier order, we are going to use this
7 conference to take care of certain matters, pre-trial
8 matters, before we go to Hearing.

9 And one of the things we would like to
10 discuss is whether there's agreement as to what the
11 protected activities are that are involved in this
12 proceeding. Do parties have objection to that, or can
13 we just rely on the Notice of Violation and the Notice
14 Imposing Civil Penalty?

15 MR. DAMBLY: I think you need to address
16 that to TVA, Your Honor. I don't know if they agree
17 with what we put down there or not.

18 JUDGE BECHHOEFER: Right. Mr. Fine or
19 whoever else wishes to deal with that?

20 MR. MARQUAND: Hang on a second, Your
21 Honor. We don't have the Notice of Violation in front
22 of us.

23 JUDGE YOUNG: Just to sort of put this in
24 context, this is Judge Young, as we said in our
25 earlier Order, what we want to do is try to define the

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1 issues as clearly as we can and some of TVA's
2 responses following your suggesting various sub-
3 issues. And we think that it would be good if we could
4 be as clear as possible on all of these issues to find
5 out where, if the parties are in agreement, to clarify
6 that and if there are disagreements on what the issues
7 are, what those disagreements are. And just in
8 discussing the case, we looked at the factual issues,
9 the legal issues, the factual issues, the primary one
10 seems to be the issue of the protected activity and
11 the legitimate business reason for the actions for
12 outcomes. Then on the legal issues, what would be the
13 controlling regulatory authority, the standard and
14 burdens of persuasion and proof.

15 What we would like from you, is
16 clarification on where you're in agreement and where
17 you're in disagreement.

18 And I guess, Mr. Dambly, you said that you
19 wanted us to direct this to TVA and I suppose, in one
20 sense, TVA in responding. You have in a sense, raised
21 some issues and do not appear to completely track what
22 the staff has said in their Notice of Violation and
23 Order Imposing Civil Penalties, or are we
24 misunderstanding that?

25 MR. MARQUAND: We took issue with the

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1 Notice of Violation, obviously. We think, we are
2 somewhat uncertain about the standard of either the
3 Burden of Proof or the Burden of Persuasion that the
4 NRC staff proposed. If we are reading the Notice of
5 Violation correctly, or as we read the Notice of
6 Violation, we disagree with the Burden of Persuasion
7 and of going forward/Burden of Proof that the NRC
8 staff proposed.

9 JUDGE YOUNG: In your Pre-Hearing
10 Statement, on Page 10 and 11, you defined the issues
11 to be mitigating, yet the first one you define is,
12 "What is the Standard of Proof," and then looking back
13 at your January 22nd Reply, you go into your view of
14 the Burden of Proof and the Burden of Persuasion in a
15 fair amount of detail.

16 Maybe at this point, does the staff -- Mr.
17 Damby, does the staff disagree with the step-by-step
18 analysis that TVA has done is doubting that was
19 Enclosure 1 to the January Reply?

20 MR. DAMBLY: Unfortunately, I don't have
21 the January Reply in front of me, but I think we're in
22 agreement that the Burden of Proof is preponderance of
23 the evidence. I think we're probably in disagreement
24 over the issue of the weight, if you will, to be
25 applied to the DOL proceeding which they've analyzed.

1 Should the staff -- should this be DOL and should the
2 staff prove by preponderance that Mr. Fiser's
3 protected activities were a contributing factor that
4 led to his non-selection and etcetera.

5 TVA could still then come in and show by
6 clear and convincing evidence that, in spite of that,
7 he's not entitled to a remedy because they had
8 legitimate business reasons that would have led them
9 to do the same thing.

10 Our position is that, just like under
11 Title VII, and for that matter under Section 211, a
12 reading of 211 says, "If we demonstrate by
13 preponderance of evidence that Mr. Fiser's protected
14 activity was a contributing factor in the actions they
15 took, that is sufficient and that is a violation."
16 What 211 says is, "You don't award a remedy if they
17 can show that they would have done the same thing, but
18 a violation would have occurred," which is similar to
19 what is in Title VII, I think after the 1990
20 amendments to the Civil Rights Act of 1964.

21 If you show discrimination was a
22 motivating factor, even a but-for standard will effect
23 a remedy but it will not effect whether a violation
24 occurred.

25 MR. MARQUAND: I agree in part with what

1 Mr. Dambly said. We have a disagreement with respect
2 to the --

3 JUDGE BECHHOEFER: By the way, is this Mr.
4 Fine, or?

5 MR. MARQUAND: Mr. Marquand.

6 JUDGE BECHHOEFER: Oh, okay. Would you
7 identify yourselves before speaking? I think that
8 would be useful.

9 MR. MARQUAND: Mr. Marquand. We do have
10 a partial agreement with Mr. Dambly that we part ways
11 over the use of a but-for causation test. We also
12 tend to correct him on one minor point. Neither Title
13 VII nor Section 211 of the Energy Reorganization Act
14 could offer remedy in a dual motive case. It simply
15 cuts off the cause of action.

16 I mean, you can't prove discrimination,
17 but in our view, our reading of 50.7 and the way it's
18 been applied in the past, is it's been applied
19 similarly to Section 211 and Title VII. And where we
20 really disagree is, the way we read the Notice of
21 Violation, is the staff is applying a different test
22 under 50.7, than would be applied under Title VII or
23 under Section 211 of the Energy Reorganization Act.
24 We think that those are read the same way.

25 JUDGE YOUNG: Let me see if I can state my

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1 understanding. This is Judge Young. Let me see if I
2 can state my understanding of what TVA is saying and
3 then ask whether and to what extent the parties agree
4 with my understanding of what TVA's saying.

5 First, that, and this is not necessarily,
6 I don't necessarily equate this with actual order of
7 proof. I think that's a separate issue. In other
8 words, which witness goes first and so forth, but it's
9 the order in which we would analyze the evidence
10 that's presented. And that is we first look to see
11 whether the NRC staff can show a prima facie case of
12 discrimination by showing typically that Mr. Fiser
13 engaged in some protected activity.

14 Two, the employer was aware of the
15 protected activity. Three, the employer took adverse
16 action against the employee, and then that the
17 evidence is sufficient to permit an inference that the
18 protected activity was the likely reason. Then if we
19 get beyond that issue, if we find that the NRC has
20 presented a prima facie case of discrimination or
21 retaliation, then we look to see whether TVA has shown
22 legitimate business reasons for the action.

23 Then if we find that TVA has shown a
24 legitimate business reason for the action, we look to
25 see whether the NRC staff has shown that the business

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1 reason was a pre-text for retaliation by showing
2 either that TVA's reason was false or that the
3 protected activity more likely did not motivate the
4 action.

5 Now to that point, I am assuming that the
6 parties do not disagree. Am I correct or incorrect on
7 that?

8 MR. MARQUAND: This is Brent Marquand, of
9 TVA. We agree with your statement that that is the
10 proper analysis for the Burden of Production in a
11 Title VII, in a Section 211 case, and under 50.7.
12 There is also, however, as I'm sure you're aware, a
13 second analysis in what's called a dual motive case,
14 and I think that's where we disagree with the staff.
15 In a dual motive case --

16 JUDGE YOUNG: Well, before we go to that,
17 let me ask Mr. Dambly, do you agree with the analysis
18 up to that point?

19 MR. DAMBLY: Yes, Your Honor.

20 JUDGE YOUNG: Okay. So now we're to the
21 dual motive case. Mr. Marquand, go ahead.

22 MR. MARQUAND: In a dual motive case,
23 where, and I think this is where we differ, I'm going
24 to argue, and I think the law is clear in Title VII
25 and under Section 211 where the Complainant or the

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1 Proponent proves by preponderance of the evidence that
2 the adverse action was taken because of protected
3 activity, or because of the individual being in a
4 protected class. Well, they proved by preponderance
5 of the evidence that, that discrimination played a
6 part, maybe not the entire motivating force, but
7 played a part.

8 It is the employer's burden then to come
9 forward with evidence by clear and convincing
10 evidence, to prove that they would have done it in any
11 event, for legitimate reasons. And as I understand
12 the staff, the staff is saying they think that they
13 have a preponderance of the evidence, that they can
14 show by preponderance of the evidence that Mr. Fiser's
15 non-selection for a new job was motivated in part by
16 protected activity.

17 They're saying, "They win," that under
18 50.7 that the clear and convincing evidence standard
19 is not applicable under 50.7, that there is a
20 violation regardless of whether the employer had
21 legitimate motives that it would have undertaken in
22 any event. And that, that is where the staff differs
23 in its analysis of 50.7 from Title VII or Section 211
24 of the Energy Reorganization Act.

25 And I think that's where we differ in our

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1 analysis of the law.

2 JUDGE YOUNG: Mr. Dambly?

3 MR. DAMBLY: Yes, Your Honor? I think
4 that's a reasonably accurate statement, I need to
5 state at the outset here that 50.7 is not 211. 211 is
6 informative as is Title VII. There is no 50.7 case
7 law and we're not bound by DOL and we're not bound by
8 the Title VII analysis.

9 You all are actually writing on a clean
10 slate, because there's never been a 50.7 case. You
11 can look to those and we intend to look to those for,
12 you know, guidance and I think we've agreed on the
13 basics. The difference, and where the staff differs
14 from TVA, and where 211 and the staff would diverge,
15 is the entire purpose for 211 was to provide a forum
16 for a personal remedy for individuals who have been
17 the victims of discrimination.

18 The NRC does not have the authority to
19 provide personal remedies and DOL was given the
20 authority to provide personal remedies. The clear and
21 convincing test or a but-for test under Title VII or
22 whatever, goes to, well, if the employee would have
23 been in the same position anyway, then they don't
24 deserve a remedy. The staff's position is the whole
25 purpose for 50.7 and all the progeny and the various

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1 other parts throughout 10 C.F.R. is to tell licensees,
2 "You can't consider protected activity and if you take
3 it into account, that's a violation," because we're
4 not giving Mr. Fiser a personal remedy.

5 We're telling TVA, "You can't take that
6 into account in your decision making process. If you
7 did, that's a violation." We don't care whether Mr.
8 Fiser wasn't personally entitled to remedy or not,
9 because they would have done the same thing. If they
10 considered his protected activities, that's off limits
11 and they can't do it.

12 JUDGE BECHHOEFER: Oh, by the way, do you
13 take the position that NRC could not require, maybe
14 not in this proceeding, but in general, could not
15 require that TVA afford Mr. Fiser a job under the
16 technical qualifications of licensee section, which
17 permits the staff to consider whether the licensees
18 are technically qualified to carry on the activities,
19 whatever they're supposed to do? Would the staff take
20 the position that NRC could not require TVA to give a
21 particular job to Mr. Fiser?

22 JUDGE YOUNG: Tell them who you are.

23 JUDGE BECHHOEFER: Yes, this is Judge
24 Bechhoefer speaking.

25 MR. DAMBLY: Judge Bechhoefer, the answer

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1 to that question is yes, the staff would take the
2 position that we can not order any personal remedy for
3 Mr. Fiser, including reinstatement to a specific
4 position. That was part of the principal reason I
5 indicated earlier, when the 211 was taken up on the
6 Hill.

7 As you know, I believe it's the Calloway
8 case in which the Appeal Board first held that we had
9 the authority to take actions against licensees for
10 discrimination against whistleblowers. But, the staff
11 had concluded that we couldn't do anything for the
12 whistleblower, and that led to 211 providing an
13 individual remedy. We don't provide individual
14 remedies. We can issue orders against TVA and impose
15 civil penalties against TVA, but we cannot require
16 them to re-hire Mr. Fiser.

17 JUDGE YOUNG: That brings me to a question
18 and it sounds to me as though it would be appropriate
19 to have the parties brief this issue of whether that
20 last step that TVA argued we should include in our
21 analysis, whether we should in fact consider the TVA's
22 analysis of the dual motive cases.

23 And a question that I have about those,
24 I've done employment cases in previous work as an
25 Administrative Law Judge in Tennessee, and you're

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1 right, the case law with regard to remedies, I think,
2 is as TVA has stated it. I cannot recall, however,
3 and I want to ask both of you, whether there is
4 separate case law on the analysis apart from the
5 remedy, when you have a dual motive case, because
6 there may be a distinction, as Mr. Dambly argued
7 between a case under 50.7, which would not involve
8 personal remedy for Mr. Fiser and whether there has
9 been actual discrimination and retaliation. And what
10 I would like to know, is whether there is any case law
11 on that issue outside the context of the remedy. Does
12 that make sense? Does my question make sense?

13 MR. MARQUAND: Your Honor, I'm not sure I
14 understand but let me, this is Brent Marquand from
15 TVA, and I'm not sure I understand your question. I
16 think we indicated before that at least under Title
17 VII and under Section 211, the case law doesn't say
18 that that cuts off a remedy.

19 It says that that is a part of the proof
20 of discrimination, and that the remedy is afforded
21 once discrimination is proven. The fact an employer
22 would have taken undertaken the same action for
23 legitimate business reasons goes to the liability
24 issue for discrimination, not whether the employee is
25 entitled to a remedy.

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1 JUDGE YOUNG: Well, if you'll look at your
2 footnote 3 on Enclosure E1-7 on Enclosure 1, to your
3 January 22nd, 2001 Reply, does everyone have that?

4 MR. MARQUAND: I think so. Yes we do,
5 Your Honor.

6 JUDGE YOUNG: Okay if you'll look at
7 Footnote 3, the first half of that footnote implies
8 that the analysis that we're talking about applies
9 only to the issue of remedy. The last case cited, you
10 don't define whether it refers to the remedy issue.

11 MR. MARQUAND: I'm afraid that's a little
12 unclear.

13 JUDGE YOUNG: That's what I'm trying to
14 get some clarification on, because I think it would
15 make, I think the distinction that Mr. Dambly is
16 drawing makes sense in terms of the remedy issue. And
17 then what we look to, what would be more analogous,
18 would be if there were case law talking about
19 liability before even getting to the remedy issue in
20 these dual motives-type cases.

21 MR. DAMBLY: But, Your Honor, this is
22 Dennis Dambly again, if you look at 211 to start with,
23 and you look at Section 211 and you look at, let's
24 see, where are we, B2, B3C says, "The secretary may
25 determine the violation of subsection A has occurred

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1 only if the Complainant has demonstrated that any
2 behavior described in the protected activity sections,
3 was a contributing factor in the unfavorable personnel
4 action."

5 The next section D says, and that said a
6 violation, they can determine a violation occurred.
7 D says, "Relief may not be ordered if the employer
8 showed, demonstrated by clear and convincing
9 evidence." And again, although I don't have it in
10 front of me, my recollection, and I will say in
11 addition to this, there is DOL case law, there is
12 Secretary of Labor decisions which say, "We find the
13 violation has occurred. Now we will determine whether
14 or not to grant relief because of the clear and
15 convincing evidence standard."

16 And I can cite those if you want us to
17 file a brief at some point. We'll be glad to provide
18 you citations to that case law. My recollection,
19 although I don't have Title VII in front of me, and I
20 guess, like Your Honor, I've tried a whole bunch of
21 those cases once upon a time, but it's been a few
22 years, but my recollection of the 1990 amendment, when
23 they dealt with the dual motive issue, found in a dual
24 motive case that that is a violation of Title VII, but
25 it affects potentially the remedy, the personal relief

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1 to be granted.

2 It does not do away with the violation,
3 which was the law before that, if I'm not mistaken.

4 JUDGE YOUNG: It seems to me one way to
5 perhaps narrow this issue, if we can all agree that
6 the issue of remedies does not come in and we simply
7 look at what is necessary to prove a violation, then
8 that narrows us down to what is the case law on how to
9 prove a violation in a dual motives case.

10 And if in fact all the cases that TVA,
11 that you're relying on, refer to the remedy, that
12 would lead us in one direction. If you have cases that
13 are under the violation issue, that would lead us in
14 another direction. And that is the kind of
15 clarification that would be helpful to me and I think
16 to the Board in analyzing what analysis do we need to
17 apply to the facts in this case.

18 TVA, Mr. Marquand, Mr. Fine, Ms. Maxwell,
19 Mr. Slater, I think I got all your names, are you, do
20 you agree with staff that the remedy issue does not
21 come in here or would you still argue that it does,
22 that we should apply the case law under the remedy
23 issue to whether there's a violation?

24 MR. MARQUAND: Marquand here. We agree
25 with Mr. Dambly that there is not under 50.7, a remedy

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1 available for Mr. Fiser. But, we do not have at our
2 disposal at this moment, I mean right in front of us,
3 we have not considered that issue, and we would want
4 to consider that before taking a position on that.

5 JUDGE YOUNG: Okay, because it seems to
6 me, if we can clarify that, that would pretty much
7 nail down what the analysis is. If Mr. Dambly's
8 right, in determining whether there's a violation, we
9 simply look to whether there's a preponderance of the
10 evidence that discrimination and/or retaliation were
11 the contributing factor, then that's the analysis.

12 If there's some other case law you're
13 reading that the action would have occurred anyway
14 because of the other reasons, then that would lead us
15 in a different direction, and I think we probably need
16 to get that clarified fairly early on, so everybody's
17 on the same page. So, we can probably set a deadline
18 for that you all could talk and see if you're in
19 agreement, and negate the need for any briefing. Any
20 proposals from either of you?

21 JUDGE BECHHOEFER: By the way, I would
22 like to, this is Judge Bechhoefer, I would like for
23 perhaps staff to indicate which version of Section
24 50.7 they are relying on. We have noted that there
25 has been some changes in the last few years. I know

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1 what it is currently.

2 I know that, I think seven years ago, it
3 was read a little bit differently. These are
4 arbitrary dates, but, which, and I'm not sure how it
5 read, at the time, in 1993. Well, I think in 1993 it
6 did read differently from what it does today, and 1993
7 being the year of Mr. Fiser's complaint letter, so I
8 would like to define, have the parties define which
9 version of Section 50.7 they are relying on. Perhaps,
10 Mr. Dambly?

11 MR. DAMBLY: Your Honor, I think to the
12 extent that I'm aware of any changes that were made in
13 50.7, I know 50.7F was added and I don't think that
14 that is at issue in this particular proceeding, but
15 other than that, I don't know what changes necessarily
16 were made. But I don't think they would have anything
17 substantively to do, in '93, going to DOL was
18 protected activity and going to DOL is protected
19 activity now.

20 I mean, I don't think in terms that we may
21 disagree whether or not he did various things, Mr.
22 Fiser. But I don't think that any definitions in 50.7
23 are going to have changed that would have any effect
24 on, there may be a factual disagreement. I think
25 primarily the disagreement is whether his protected

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1 activity had anything to do with the outcome.

2 JUDGE BECHHOEFER: In 1993, didn't 50.7
3 require, let me read this right now, require, it did
4 say, "Activities include but are not limited to," but
5 it did then specifically say, "Testifying in a
6 commissioned proceeding." Today it reads a bit
7 broader than that.

8 MR. MARQUAND: Your Honor, this is Brent
9 Marquand of TVA. Mr. Fiser filed a 1993 Department of
10 Labor complaint. That is his alleged protected
11 activity. In his 1996 Complaint, which is his basis
12 for the NRC staff investigating and going forward with
13 the NOV, I think the activities we're focused on here
14 occurred, the TVA activity occurred in 1996, after the
15 most recent changes to 50.7, and we do not have a
16 problem with the application of 50.7 as it is
17 currently codified.

18 JUDGE BECHHOEFER: I see. Okay, I was just
19 phrasing the question because I know in '93 it did
20 read a bit differently.

21 MR. MARQUAND: Right. But obviously the
22 adverse action occurred in 1996 after those changes
23 had been made, and we had proceeded all along to
24 understand that his filing of a Department of Labor
25 Complaint in 1993 was protected activity. Obviously,

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1 we were aware of it and in 1996, some three years
2 later, it was our position that we did what we did for
3 legitimate reasons and did not consider his 1993
4 complaint against him in making any decisions.

5 JUDGE YOUNG: So, are the parties in
6 agreement that the protected activity at issue is the
7 Department of Labor complaint filed in 1993? We're
8 not going to go back into the 1991 to 1993 activities?
9 We were not altogether clear on the relevance of those
10 and the degree to which those were going to come into
11 the proof in this case.

12 MR. MARQUAND: Your Honor, we have a
13 problem with the 1993 Department of Labor complaint.
14 Under the --

15 JUDGE YOUNG: This is Mr. Marquand?

16 MR. MARQUAND: Yes, Your Honor. Under the
17 Department of Labor standards, at least, you do not
18 establish protected activity by complaining about
19 something that's not protected, and in our view, his
20 1993 complaint was not substantiated. It wasn't just
21 our view. It was the NRC staff's view.

22 The 1993 complaint was not substantiated,
23 because he hadn't engaged in protected activity. And
24 he does not establish, he doesn't boot strap himself
25 into protected activity by filing some complaint about

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1 something that's not protected. That's the Department
2 of Labor law. That's certainly the law under Title
3 VII. You can't file a complaint claiming
4 discrimination based on race, if you can't establish
5 that you're a member of a protected class. You can't
6 bootstrap protected activity and protected classes.
7 So from that standpoint, we would look at the 1991
8 activity to say the 1993 complaint wasn't protected,
9 wasn't protected activity itself.

10 JUDGE YOUNG: Well I thought I heard you
11 a minute ago, say that you agreed that the filing in
12 1993 was protected activity, that you're not --

13 MR. MARQUAND: As we, well, as we
14 understand the staff, that's the basis of their claim
15 of protected activity. We generally agree that filing
16 a Department of Labor complaint for purposes of 50.7
17 is normally protected activity, but in this particular
18 case, it wasn't protected activity, because the
19 underlying activity wasn't protected.

20 JUDGE YOUNG: And so is that your, would
21 your argument also extend, I understand there's a 1996
22 complaint that I don't think we have a copy of, but
23 would that analysis extend to that?

24 MR. MARQUAND: I would think that it would
25 have to. I mean, it's simply non-protected activity

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1 filed, a claim based on non-protected activity doesn't
2 arrive to protected activity. The '96 complaint,
3 again, of course nothing happened to him because of
4 that, but the '96 complaint could not be substantiated
5 because there was no other law on protected activity.
6 I think that there's some analysis.

7 JUDGE YOUNG: So then, there is a
8 challenge to whether there was protected activity?

9 MR. MARQUAND: I think that's a fair
10 statement.

11 MR. DAMBLY: Judge, just so it's clear
12 from the staff's perspective, I don't agree with the
13 law as Mr. Marquand seemed to have been citing it.
14 And I also don't agree with the characterization of,
15 "You couldn't substantiate the '93 or the '96" because
16 they settled both of those cases, so there's been
17 adjudication of those cases.

18 MR. MARQUAND: No, in the 1993 complaint,
19 as I understand the NRC staff looked into the 1993
20 complaint and it was not substantiated due to a lack
21 of protected activity.

22 JUDGE YOUNG: Okay, that's partially a
23 factual issue, obviously. To the degree that it's a
24 legal issue, I'm just sort of making myself a little
25 list of legal issues that may need to be briefed prior

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1 to a Hearing on this case.

2 Are there any other legal issues that
3 either of the parties see besides the issue of the
4 standard of proof in dual motives cases and the
5 relation of that to the remedy issue. And then now,
6 this issue on the law with regard to whether Mr.
7 Marquand's statement of filing a complaint, that's
8 allegedly not substantiated, would constitute on its
9 own, protected activity, if I'm understanding and
10 stating that correctly?

11 MR. MARQUAND: Your Honor, this is Brent
12 Marquand. I don't have any more substantive questions
13 of issue. But I do have, I mean, obviously, as Mr.
14 Dambly said, this type of case hasn't been litigated
15 before. We haven't litigated these cases before.

16 Procedurally, I have a question about how
17 the Board applies Rules of Evidence, and I'm generally
18 aware of the Commission's regulations on those, but
19 how closely the Board adheres to Federal Rules of
20 Evidence as suggested, might apply.

21 MR. DEWEY: This is Lee Dewey. The NRC is
22 not bound by Federal Rules of Evidence. We sometimes
23 are persuaded by them. We look through them, but
24 we're not bound by them.

25 JUDGE BECHHOEFER: For guidance purposes.

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1 This is Judge Bechhoefer. We look to them for
2 guidance, but we are not bound by them.

3 MR. MARQUAND: I understand that, and I
4 guess my question was, how closely the Board looks to
5 those rules for guidance.

6 JUDGE YOUNG: Is there any case law on
7 that, that anyone knows of?

8 MR. DEWEY: No, only as far as the
9 guidance. I think it would be a case by case
10 situation, but they're not binding. You have to give
11 a particular example before we could probably give you
12 an answer.

13 JUDGE YOUNG: I guess what I'm
14 understanding is, that they would relate to weight
15 given to evidence. This is somewhat new to me because
16 where I came from, we applied the Rules of Evidence
17 and there was a fairly narrow exception. So I'll be
18 learning on this issue, as well. My understanding is
19 that it is possible that evidence could be excluded if
20 it were found to be pretty much unreliable. But other
21 than that, that it would generally be admitted and the
22 Rules of Evidence would be applied as guidance in how
23 much weight it should be given. Is that a fair
24 statement of how the practice has been? I see Judge
25 Bechhoefer and Judge Cole nodding their heads and Mr.

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1 Dewey also. Mr. Dambly, do you want to --

2 MR. DEWEY: It's up to the individual case,
3 though, because it seriously is significant.

4 JUDGE YOUNG: Does the staff have anything
5 to offer on that?

6 MR. DAMBLY: Not really, Your Honor. But,
7 clearly, the major exception is the hearsay rule which
8 is not applied, and beyond that, I think it if
9 evidence goes to the weight, certainly if the witness
10 is not competent, he's not competent under our rules,
11 their rules or anybody's rules. And if you can't
12 authenticate documents, etcetera.

13 But the formality's not the same as it
14 would be under the Federal Rules, but again, as I
15 guess as Mr. Dewey said, they're guidance and
16 primarily from my experience, the one major exception
17 if you want to call it that, is hearsay is not
18 challengeable per se.

19 JUDGE YOUNG: Does that clarify this issue
20 for you, Mr. Marquand?

21 MR. MARQUAND: Yes, Your Honor. Thank
22 you.

23 JUDGE YOUNG: Were there any other issues
24 then, legal issues that either party would see the
25 need to either have further consultation between each

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1 party and some statement of agreement or briefing on
2 then?

3 MR. DAMBLY: Well, the staff would
4 certainly be prepared to break, that I have a feeling
5 there will be no agreement.

6 JUDGE YOUNG: On the first two issues that
7 I've named?

8 MR. DAMBLY: Right.

9 JUDGE YOUNG: Then it seems that those
10 probably do need to be briefed at some point. That
11 covered, we do need to go into the issue of the
12 scheduling and the --

13 JUDGE BECHHOEFER: Well, I guess we did.
14 We've received a proposal, a joint proposal from the
15 parties concerning both the length of Discovery and
16 the inclusion of a date for what's termed Dispositive
17 Motions. Now, I'm not, I think the proposed Discovery
18 schedule is considerably longer than would normally be
19 adopted, at least initially, and in an NRC proceeding
20 generally. And we're not sure why it should wait to
21 start until August 13, which is the proposed date,
22 which is just about three weeks from now.

23 Theoretically, Discovery could start
24 immediately, but I'd like comments on why, first, why
25 the length of the Discovery period. Why wouldn't say

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1 60 days or 60 to 90 days be sufficient? I think the
2 Commission has in its Proposed Rules, which are for
3 comment -- which are out for comment, or in some other
4 kinds of cases, Subpart K cases, there's a specific
5 limitation of 90 days after the good cause, for
6 extension, and there always could be extensions and
7 periods, but why the essentially 120 days plus three
8 weeks before it even starts? I just would like an
9 explanation and any of the parties may lead off, or
10 respond.

11 MR. DAMBLY: Well, I'll lead off, Your
12 Honor.

13 JUDGE BECHHOEFER: This is Dennis?

14 MR. DAMBLY: This is, yes, Mr. Dambly. We
15 received a phone call from TVA and this is, well they
16 had actually proposed starting on August 3rd and I
17 had, you know, if they're comfortable with that, I
18 have no problem with that. The month of August is not
19 a good month for me anyway, with vacation and maybe
20 that's, you know, that's just kind of an awkward time
21 to start things, maybe with a lot of people going on
22 vacation or otherwise. So, but I had no problem with
23 the schedule they proposed, and my view is if the
24 licensee is not complaining about the time, then I'm
25 not going to worry about it.

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1 MR. FINE: This is Tom Fine at TVA. I'm
2 the one who had spoke with Mr. Dambly about the
3 schedule and I appreciated his cooperation on the
4 joint proposal we put to you. I think there were a
5 couple of things that were of concern to us, that I
6 think are relevant concerns. The start date was I
7 think as much for anything, a matter of convenience
8 for Counsel.

9 As Mr. Dambly said, we had originally
10 proposed 3rd of August. He had some personal plans
11 where he asked if we could push it back and we were
12 happy to do so. We'll be happy to re-visit that if
13 that's something that the Board is concerned about.
14 More substantively, the length of time we're
15 proposing, really comes out of the fact that I think
16 as we all recognize, this is somewhat of a new sort of
17 proceeding, before this forum.

18 It's our understanding that this has been
19 a very rare kind of case to come this far, in front of
20 the Board for an evidentiary Hearing. And some
21 concern about having enough time to fully develop the
22 facts before we get in front of the Board for that
23 Hearing.

24 Also of more specific concern to us in
25 this case, is that we would anticipate the need to

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1 take a number of depositions and the scheduling of
2 depositions and having them taken and transcribed can
3 eat up considerable amounts of time. We have in
4 particular, a couple of witnesses who are not in the
5 Tennessee area at this time, and who have left TVA or
6 left this region, and it may be difficult to be able
7 to get them scheduled for depositions.

8 In particular, one individual, Wilson
9 McArthur, who's name appears with some frequency, a
10 materials -- that are involved in this case, is one of
11 the people that the NRC has identified as being one of
12 the folks responsible for the improper action,
13 improper decision involving Mr. Fiser. Mr. McArthur
14 is retired from TVA. He is not in the best of
15 physical health and is currently in Salt Lake City,
16 all of which raise questions as to getting him
17 scheduled for a deposition, whether that deposition in
18 fact, would have to be in lieu of live testimony at a
19 Hearing, which might require videotaping it, that kind
20 of consideration.

21 JUDGE YOUNG: Let me just ask a question.
22 Were the facts in this case, have they been developed
23 at all, through any of the Department of Labor
24 proceedings or have those pretty much, were they
25 settled so quickly that none of that really occurred?

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1 MR. MARQUAND: Your Honor, this is Brent
2 Marquand. It was settled at the Department of Labor
3 level to prior to the majority of any Discovery that
4 could be taken at the Department of Labor level. I
5 believe two people were deposed on very narrow points
6 at the Department of Labor level. There was an
7 investigation. There obviously was no cross-
8 examination of any other individuals. So, in our
9 view, the facts are fairly undeveloped.

10 People have had statements taken, but
11 that's about it. With respect to any sort of cross-
12 examination to establish whether they have any
13 competency or foundation for their testimony, remains
14 to be seen, and as Mr. Fine indicated, there are a
15 number of people, in addition to Mr. Fiser, who are no
16 longer employed by Tennessee Valley Authority, who
17 will need to be contacted. We can anticipate some
18 written Discovery in this case, as well, and
19 anticipate that any depositional type of Discovery
20 would follow that written Discovery.

21 So, in order to sequence the Discovery, we
22 suggested the proposed schedule, also recognizing that
23 we had proposed the Dispositive Motion cut-off,
24 obviously trying to avoid the holidays, so that, you
25 know, there's a lot of things that have to be

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1 considered, I think, in this, and I guess, it's our
2 feeling that it's better to come up with a realistic
3 schedule than to suggest a schedule and then come back
4 and ask to have it extended a couple of times.

5 JUDGE BECHHOEFER: Let me ask the parties,
6 do they, or TVA particularly, do you see any need for
7 so called Dispositive Motion, Summary Disposition
8 Motions, etcetera? Do you see any need or usefulness
9 in even entertaining such motions?

10 MR. MARQUAND: Your Honor, that was all
11 right to do it --

12 JUDGE BECHHOEFER: But would it be, but how
13 can it be useful? If we can't dispose of the whole
14 case that way?

15 MR. MARQUAND: Your Honor, this is Brent
16 Marquand again. It was our proposal to put that time
17 period in there in Dispositive Motion. It's our view
18 as the parties already suggested that there's a real
19 issue here about the legal standards involved in this
20 case and depending on the outcome of that briefing,
21 which we would anticipate, at least that we
22 anticipated being part of a Dispositive Motion, that
23 could be dispositive of the case, as well as whether
24 or not the staff can even make a prima facie case of
25 discrimination here.

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1 In our view, the actions that we're
2 taking, were undertaken for legitimate business
3 reasons only, and we don't think that there's any
4 evidence that would even make a prima facie case to
5 show that discrimination played even a part in the
6 actions that were taken here, and if that's a proper
7 subject of a Dispositive Motion.

8 JUDGE BECHHOEFER: Mr. Dambly, any
9 comments?

10 MR. DAMBLY: I certainly would agree that
11 at some point prior to there being a Hearing, we
12 should probably brief the legal issues. I can't
13 believe that we're going to get to the place that you
14 could rule on, based on Discovery, some Dispositive
15 Motion because there will be factual disputes and I
16 think those have to be presented. I can't imagine we
17 will get to a place that there's uncontested facts
18 that make it clear that one side or the other would
19 win and --

20 JUDGE BECHHOEFER: Well, I agree that we
21 should have briefs on some of these questions. My
22 question was about the Motions for Summary Disposition
23 are likely to occupy a period of some probably, at
24 least two months. The question is, is that type of
25 delay in the proceeding warranted?

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1 MR. MARQUAND: I would guess, Your Honor,
2 that you know, maybe we could revisit that after the
3 close of Discovery. I think the Discovery schedule is
4 not unreasonable and while, as you indicated, normally
5 one might set a 60 day or whatever, my experience
6 tells me that that 60 is never, ends up being hard and
7 fast, and usually goes, in many cases, even longer
8 than this, particularly where there's the number of
9 depositions and trying to arrange when somebody's
10 available or not.

11 So, I think the schedule is not overly
12 long. It may appear so up front, but I mean, if you
13 look at it after the fact, and Discovery in other
14 cases and how long they actually took, you know, it's
15 not unusual to see it six months or more. So, I think
16 having a four month Discovery schedule is not
17 unreasonable, and I think we can clearly revisit the
18 need for Dispositive Motions at the end of that.

19 JUDGE YOUNG: If we go along with your
20 proposed schedule, I think we would want to strongly
21 encourage you to stick to it and get started as soon
22 as possible, and also from our standpoint, if there
23 developed any need for Discovery-related Motions, that
24 those be filed promptly and only after making a good
25 faith effort to work them out by agreement, so that

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1 that doesn't slow things down.

2 JUDGE BECHHOEFER: We could have telephone
3 conferences to resolve particular Motions, Discovery
4 Motions, that are presented, so that we could do it as
5 the case goes on. It might be useful to do it that
6 way.

7 MR. FINE: Your Honor, this is Tom Fine,
8 at TVA. We're of course, used to working
9 cooperatively with opposing counsel to try and resolve
10 any Discovery disputes and limit the time that we have
11 to take the matter for some form of judicial
12 resolution. We would certainly try to follow that
13 same course of conduct here. I think we've already,
14 at least initially, established those at a certain
15 level of cooperation, as evidenced by our submission
16 of the Joint --

17 JUDGE YOUNG: Sounds good. Do you think
18 we should set a status, another status conference
19 somewhere near the middle or late part of the
20 Discovery schedule, just to sort of make sure that
21 we're on track? Does that sound like an appropriate
22 thing to do?

23 MR. FINE: Fine again, at TVA. I think
24 that would be an excellent idea.

25 JUDGE BECHHOEFER: Let's do that. Set a

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1 precise date to have a status, well, should we, I'd
2 be, yes, the Board thinks that we won't set a precise
3 time and date right now. But sometime in mid-November
4 it might be useful to have a status conference similar
5 to this one, a telephone conference. Is that, would
6 that satisfactory for the various parties?

7 MR. FINE: Your Honor, this is Tom Fine
8 for TVA. It would certainly be satisfactory for TVA.

9 MR. DAMBLY: And this would be fine for
10 the staff to, Your Honor.

11 JUDGE YOUNG: It might be a good idea if
12 prior to that point, in the course of your Discovery
13 and since it does seem like you're working very well
14 together, to discuss these legal issues further and by
15 the time of that status conference, be able to tell us
16 whether you've reached any agreements on the
17 definition of the legal issues and your areas of
18 disagreement and what remains to be briefed, so that
19 we could go ahead and set a deadline at that point.

20 MR. FINE: That's fine from TVA's
21 standpoint. Tom Fine, again.

22 MR. DAMBLY: No problem, Your Honor.

23 JUDGE BECHHOEFER: We'll set up as a
24 target, Wednesday, November 14th, but that will just
25 be a target. We'll set it forth through in an Order

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1 later on. Okay?

2 MR. MARQUAND: Your Honor, I think there
3 was still a sort of, maybe an issue floating around
4 out there, whether we ought to abide by the proposed
5 schedule we had in terms of starting Discovery on
6 August 13th or whether it might be wise simply to go
7 ahead and commence Discovery at the conclusion of this
8 teleconference, and this is Brent Marquand of TVA.
9 And we certainly don't have any problem going either
10 route.

11 JUDGE YOUNG: Mr. Dambly, I think you're
12 the one who had personal plans. If TVA were to go
13 ahead and start their Discovery and file written
14 requests, would that put you in a difficult spot in
15 terms of responding when you get back? Or are there
16 other people, have the other lawyers go ahead and get
17 started on --

18 MR. DAMBLY: I believe I'm out next week
19 and then the following two weeks and Ms. Chidakel's
20 out next week. So, and Ms. Euchner, unfortunately,
21 she won't be assigned to me permanently until next
22 month. So, she's still working for another Assistant
23 General Counsel at the moment, although, when she was
24 on the original rotation here, this was her case. But,
25 I don't have her services until August, you know, if

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1 they want to start now and send in Discovery, it may
2 be that we're going to have to get together, but I
3 can't get to Answers until early September or late
4 August or something anyway, so, you know, we may need
5 relief from the staff, just because the staff here is
6 not going to have people physically present. So, if
7 they file something tomorrow with a two-week
8 turnaround, we won't be able to do it in two weeks.

9 MR. MARQUAND: This is Brent Marquand. We
10 certainly don't have any problems in working with
11 Counsel with respect to your schedules and if when we
12 send you something, you need additional time, all you
13 have to do is call us up. You know, I mean, we're
14 reasonable people and you know, if it takes you
15 additional time to get something together, just let us
16 know.

17 MR. DAMBLY: I mean, again, if you want to
18 start it now, it doesn't make any difference to me.
19 I'm not sure to what extent the staff is even going to
20 have material.

21 I'm sure we'll be asked for some, but I
22 believe TVA has most everything that we have at the
23 moment, and the staff outside of possibly a witness
24 from the Office of Enforcement to explain the infamous
25 metro map and how we got to where we got to in the

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1 civil penalty sense, the staff has no witnesses. I
2 mean, this is all TVA people and former TVA people and
3 what they did to each other kind of stuff. So, you
4 know, the staff doesn't have a lot to provide.

5 JUDGE YOUNG: Excuse me, let me, did you
6 say the staff has no witnesses that you're going to
7 present?

8 MR. DAMBLY: No, none of the staff, we
9 certainly will be providing witnesses.

10 JUDGE YOUNG: Oh, okay.

11 MR. DAMBLY: TVA people. We would have
12 somebody from the Office of Enforcement as you do in
13 all enforcement cases, come and explain the
14 enforcement of policy and how you get to where you get
15 to for the civil penalty, which is something that's in
16 front of the Board to determine whether that was an
17 appropriate amount or it should have been another
18 amount or, you know, those kinds of issues, whether
19 they properly followed the enforcement policy in
20 reaching the decision that was reached.

21 But, factual witnesses, the staff has
22 none. I mean, there are no NRC people involved in any
23 of these discussions, as to who said what to who or
24 who did what to who. The only material that we have
25 that they might be interested in, I think they already

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1 got through the course of FOIA's, the OI investigation
2 and the statements they took and that sort of thing.

3 JUDGE BECHHOEFER: Have they been given a
4 copy of the so-called, OI report, the number of which
5 is referenced in the --

6 MR. DAMBLY: I'm fairly certain, you all
7 got that under FOIA request, you got the OI report and
8 all the backup with the third and personal Privacy
9 Act, I guess, information redacted?

10 JUDGE BECHHOEFER: Oh yes, at least in
11 redacted form, yes.

12 MR. DAMBLY: I think, is that correct,
13 Tom?

14 MR. MARQUAND: This is Brent Marquand.
15 That's correct. We did receive redacted information,
16 and what we'll be looking for is to find out exactly
17 what was withheld, obviously since this is a public
18 proceeding at this point, the FOIA exceptions no
19 longer apply and we'll be looking for full disclosure.

20 MR. DAMBLY: And I don't think that that
21 will be a problem. The only thing I think that we
22 might still be interested in withholding if you will,
23 and I don't know if there's any in there, so I don't
24 know what they withheld because I haven't seen it, is
25 if in the course of being interviewed, you know, they

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1 talk to John Smith and out of the blue he just makes
2 some statement that has nothing to do with the case
3 whatsoever, that would be embarrassing to somebody
4 else, and you know, I don't know if that's there or
5 not.

6 But something like that which is clearly,
7 then they say, "Oh and by the way, you know, Ray's
8 using drugs," and Ray's not even the person that's
9 involved in the case, we wouldn't turn that loose.
10 But short of that, I don't see any, you know,
11 protecting the names of people who gave statements
12 which I think was done, probably, if I'm not mistaken,
13 that wouldn't be withheld any longer. So, I don't
14 think there's going to be a problem there.

15 JUDGE BECHHOEFER: Let me ask would the
16 staff propose to present a witness from OI as
17 distinguished from OE?

18 MR. DAMBLY: I can't imagine the need to
19 present, I mean, they have no first hand knowledge.

20 JUDGE BECHHOEFER: They did the report,
21 upon which the Regional Administrator relied on
22 bringing the charges.

23 MR. DAMBLY: Well, they wrote a report,
24 but I wouldn't necessarily say that that was what was,
25 you know, the underlying documents, I mean, the

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1 statements they took from people, the documentary
2 evidence they gathered, is the basis on which the
3 staff went forward. Not OI's conclusions.

4 JUDGE BECHHOEFER: The report was
5 referenced, by the way, in the --

6 MR. DAMBLY: As a reference to the
7 information we had in front of us.

8 JUDGE YOUNG: I think probably one thing
9 that we need to discuss in this status conference, in
10 addition to what legal issues remain for briefing,
11 which is the, what you anticipate at that point, both
12 parties, that your proof will be, what kind of time
13 we'll need for a Hearing and at that point, you'll
14 probably be in a better position to address these
15 issues for all our benefit.

16 You did those, just jog my memory for one
17 other issue that I think we probably ought to make
18 clear, and I'm not sure from all the written materials
19 that it is clear, and that is the synthesis of de novo
20 proceedings, what the staff did or the Office of
21 Investigation or the Office of Enforcement did and how
22 they did it and what standards they applied.

23 To my understanding, they're not at all
24 relevant in this proceeding. This proceeding will be
25 de novo in the sense that our decision will be based

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1 on the records, on the facts, excuse me, on the facts
2 that are presented to us in the Hearing of this case.

3 Is that clear to everybody or was some of
4 the discussion about, that TVA had included in some of
5 your written documents, was that, does that indicate
6 that you expected that the Hearing would encompass the
7 what the staff did or how the investigation was
8 conducted, because I think we probably ought to make
9 that clear at this point.

10 MR. FINE: Your Honor, this is Tom Fine.
11 We understand this to be a de novo proceeding and that
12 the case will rise and fall on the evidence produced
13 to the Board during the course of this proceeding.
14 But Mr. Marquand has one additional thing, point.

15 MR. MARQUAND: And that point is, Your
16 Honor, that as I understand, we are here based upon
17 the Notice of Violation issued by the staff, and that
18 is their complaint. We're not here on anything other
19 than that Notice of Violation.

20 JUDGE YOUNG: Right. I think that the
21 Notice of Violation and the Order Imposing the Civil
22 Penalty.

23 MR. FINE: Those are, we see those as
24 essentially as the Complaint that we have to answer.

25 JUDGE YOUNG: Mr. Dambly, you'd probably

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1 agree with that, right?

2 MR. DAMBLY: I would, Your Honor, and I
3 also agree with Your Honor's statement that this case
4 rises and falls on what's presented to you. It's a
5 trial de novo, whether the IG, OI I should say,
6 conducted a good, bad or indifferent investigation is
7 irrelevant. The facts are what the facts are presented
8 to you.

9 JUDGE YOUNG: Right and the standard is
10 the standard that we need to apply, and whatever
11 standard was applied by the staff is irrelevant at
12 this point.

13 MR. DAMBLY: That's correct, Your Honor.

14 JUDGE YOUNG: Okay. As long as we're all
15 in agreement on that, then that simplifies things.
16 Are there any other issues that we need to --

17 JUDGE BECHHOEFER: Well, yes, there are a
18 bunch of them. I have a whole list --

19 JUDGE YOUNG: Oh.

20 JUDGE BECHHOEFER: -- of fairly minor
21 things. Well, first, I don't know if it's premature
22 to do it now, but what location should we be
23 considering for a Hearing?

24 MR. DAMBLY: I like Honolulu, Your Honor.

25 MR. FINE: This is Tom Fine, at TVA.

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1 While I would have reasons to agree with Mr. Dambly on
2 a personal level, in terms of where I think would be
3 most convenient for the bulk of the witnesses in this
4 matter, I would suggest Chattanooga, Tennessee.

5 JUDGE BECHHOEFER: Rather than Knoxville?

6 MR. FINE: Yes, Sir. The only people that
7 are in Knoxville, as important as we believe ourselves
8 to be, but the only people that are in Knoxville are
9 the attorneys that are pertinent to this case, and we
10 try to look out for the convenience of our witnesses
11 before we look out for the convenience of the
12 attorneys.

13 JUDGE YOUNG: And I would assume that
14 staff witnesses would also be from there?

15 MR. DAMBLY: Well, again, the staff
16 doesn't have any witnesses except, at least at this
17 point, the staff intends to present no staff employee
18 witnesses, and to the extent that the people involved
19 are in Chattanooga, I have no objection to Chattanooga
20 as the place. Obviously, one of the principle
21 witnesses is going to be Mr. McArthur, who is --

22 MR. FINE: Salt Lake.

23 MR. DAMBLY: -- Salt Lake, but I don't
24 think we will hold a Hearing in Salt Lake, so.

25 JUDGE BECHHOEFER: We could if we had to.

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1 MR. DAMBLY: Let's make it during ski
2 season, but I think that I would accept Mr. Fine's
3 statement that if most of the witnesses, and we're all
4 talking about the same group of witnesses, if
5 Chattanooga's the place, that's fine with us.

6 MR. FINE: I want to be as square with
7 everyone as I can. There are a couple of folks that
8 I'm not sure where they are currently located, but the
9 ones that I'm aware of, are either in Chattanooga or
10 either close to hand to Chattanooga, with the obvious
11 exception of Mr. McArthur in Salt Lake, and there's
12 one other witnesses who's some distance removed, but
13 he's, while he has a couple of important things to
14 say, he's not one of the major players.

15 MR. DAMBLY: Mr. McGrath, is in --

16 MR. FINE: McGrath is in Chattanooga.

17 MR. DAMBLY: I don't know where Mr. Fiser
18 is. I think we've had contact with him, but I just
19 don't know at the moment.

20 MR. FINE: The last time we knew, he was
21 in the Chattanooga area.

22 MR. DAMBLY: Okay.

23 JUDGE BECHHOEFER: Okay. Well, that
24 sounds like a place we should look for. But NRC also
25 does have a technical training center, at least at the

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1 moment, down there, and perhaps Hearing Room space
2 would be easier to come by.

3 MR. MARQUAND: The Department of Labor, as
4 Your Honor probably knows, borrows court rooms and the
5 Federal Court House of Chattanooga has been made
6 available from time to time and is a good place to try
7 cases, as well, I might suggest. And, in light of the
8 question of where the Hearing would be held, I do have
9 a question for Your Honors about the procedure for
10 issuance of subpoenas for both Discovery and for the
11 Hearing. How do we go about that? Can we simply
12 request them or --

13 JUDGE BECHHOEFER: Well, the Board has
14 authority, the Chairman of the Board may sign off on
15 subpoenas. They should be sent through us though.

16 MR. MARQUAND: So do we write a letter of
17 you, requesting the issuance of subpoenas or will your
18 office provide them to us in blank, so we can issue
19 them as need be, as the Federal Court would? How do
20 we go about that?

21 JUDGE BECHHOEFER: Well, I'll have to sign
22 them, but --

23 JUDGE YOUNG: You submit blank signed
24 subpoenas that they then serve, right?

25 JUDGE BECHHOEFER: Right. Now the

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1 information has to be pertinent or relevant to the
2 proceeding, but the witnesses also, the people served
3 with the subpoenas may object.

4 MR. MARQUAND: I was just inquiring of the
5 process to obtain a subpoena for issuance.

6 JUDGE BECHHOEFER: Well, we have blank
7 forms up here and --

8 JUDGE YOUNG: Can they just contact one of
9 the secretaries here and have them send subpoenas to
10 whichever lawyer requests them, signed subpoenas?
11 Have then gotten really fancy?

12 JUDGE BECHHOEFER: I don't know why we
13 couldn't. Yes. Sure. Okay, we can do that. We can,
14 lawyers who are going to be needing the subpoenas for
15 particular witnesses, should request, we'll send some
16 blank ones out. I'll have to sign them, and it will
17 be relevant to the particular proceeding, but we can
18 do that. Who should we send --

19 JUDGE YOUNG: Contact our office and let
20 us know when you need them, I think.

21 JUDGE BECHHOEFER: Right. Right.

22 MR. MARQUAND: That would be great. Thank
23 you.

24 JUDGE BECHHOEFER: Give us a little over
25 a week or so to get them to you.

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1 MR. MARQUAND: Okay.

2 JUDGE BECHHOEFER: Maybe not.

3 JUDGE YOUNG: No.

4 JUDGE BECHHOEFER: Well, the signed
5 copies.

6 JUDGE YOUNG: You can send copies. I'll
7 give them to the secretaries and they can just send
8 them out.

9 JUDGE BECHHOEFER: Oh, yes, we can do
10 that. Right.

11 JUDGE YOUNG: Are there any other issues
12 that you want to go through?

13 JUDGE BECHHOEFER: Yes, there are a couple
14 of other minor ones. In the first place, we would
15 appreciate copies of e-mailed filings. You do this
16 already on paper copies, but when you file something
17 by e-mail, which is a courtesy to us really, send also
18 a copy to the secretary, and the address is
19 HEARINGDOCKET, all caps, @NRCgov, NRC.gov. The
20 secretary's office said they would appreciate
21 receiving copies of the e-mail filings.

22 MR. MARQUAND: Hearing docket what?

23 JUDGE BECHHOEFER: @nrc.gov.

24 MR. MARQUAND: Okay.

25 JUDGE YOUNG: And that's to send them

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1 courtesy copies. Those won't be the officially filed
2 copies, but they like to receive the courtesy e-mail
3 copies, as well.

4 MR. FINE: Very well, we'll do that, which
5 leads to another question for TVA, because of the
6 apparent problems that you folks have been having in
7 reading our efforts to send you things by electronic
8 mail, is there sort of a technical person up there?

9 JUDGE BECHHOEFER: I have that as another
10 one on my list. The person's name is Mack Cutchin, C-
11 U-T-C-H-I-N.

12 JUDGE YOUNG: Can you send stuff in Word
13 Perfect documents?

14 MR. FINE: We don't have Word Perfect. We
15 have Microsoft Word.

16 JUDGE BECHHOEFER: Well, if you send them
17 as Word Documents, ours will convert that.

18 MR. FINE: We're working on that, as well.
19 But there's, I'm also hoping that Mr. Cutchin's
20 discussions with our technical folks may also bear
21 fruit and take care of whatever problems we are
22 having.

23 JUDGE BECHHOEFER: Okay. Let me give you
24 his telephone number. It's area code (301) 415-7397.

25 JUDGE YOUNG: Is it Mack or Matt?

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1 JUDGE BECHHOEFER: M-A-C-K, Mack.

2 MR. FINE: Great. Thank you, Your Honor.

3 JUDGE YOUNG: And if you do, I know
4 sometimes when you send Word documents over e-mail, it
5 seems to be more difficult for Word Perfect, for
6 someone who has Word Perfect to convert it at this end
7 then if you convert it at that end and maybe even send
8 two versions, if that's not too much trouble. I've
9 done that. I've used Word and Word Perfect and it
10 seems easier for the Word Perfect people to read
11 documents that have been converted at the originating
12 end.

13 MR. FINE: We'll be glad to do that.

14 JUDGE BECHHOEFER: All right. My next
15 comment has to do with whether or not prepared pre-
16 filed testimony is used. In a licensing case, which
17 this isn't, they would be routinely used unless
18 otherwise ordered under the rules. The rule provides
19 us with pre-filed testimony does not apply in an
20 enforcement case, but what are the parties likely to
21 wish to do?

22 MR. MARQUAND: Your Honor, this is Brent
23 Marquand, with TVA. Our view is that pre-filed
24 testimony is helpful when it's of a technical nature,
25 as in a licensing case. But as in a case such as

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1 this, that may involve credibility issues, you know,
2 personalities, that live testimony is much preferable.

3 Obviously, if a Hearing is necessary to
4 determine motivation, then the credibility of the
5 witnesses will be of paramount importance for the
6 Board to judge and that live testimony as opposed to
7 simply scripted testimony prepared by lawyers would be
8 of the utmost essence in this case.

9 JUDGE BECHHOEFER: Even that and subject
10 to cross examination as you are well aware, I'm sure.

11 MR. DAMBLY: Judge Bechhoefer, for the
12 staff, we like them live.

13 JUDGE YOUNG: Sounds like all the parties
14 are in agreement.

15 JUDGE BECHHOEFER: The staff is also. I
16 have had cases where the staff used prepared testimony
17 and the person, say for the violation, didn't and
18 that's been approved and the Commission rules actually
19 set that forward, set that as a standard, so, we're
20 not going to require anybody to use prepared testimony
21 if they think it's inappropriate, including the staff.

22 MR. DAMBLY: And in this particular case,
23 it would be rather difficult for the staff to even,
24 even if we wanted to which we don't, to file pre-file
25 testimony because, as I said, outside of somebody from

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1 OE, the rest of the witnesses are not NRC employees.
2 We'd be trying to get pre-filed testimony from TVA
3 people or something, and I don't think that's a good
4 idea.

5 JUDGE BECHHOEFER: Now the next point when
6 and if we get to a Hearing, I think the burden of the
7 staff would appear first with the burden of -- the
8 staff, I think, has the burden of proof and also the
9 burden of going forward, and would normally present
10 its testimony first. Then the licensee or TVA would
11 present its testimony and the staff would get
12 rebuttal. Is that the way the parties would
13 understand it? Is this case the way it should work?

14 MR. DAMBLY: For the staff, that's the way
15 I understand it, Your Honor.

16 MR. MARQUAND: Similarly with TVA, Your
17 Honor.

18 JUDGE BECHHOEFER: Okay, and I guess, the
19 question we ask in almost every case is, have the
20 parties tried to settle or could they try to settle in
21 this proceeding? There was a case that was almost
22 identical to this not long ago, to which I was
23 assigned, where the staff and the licensee did reach
24 a settlement agreement.

25 MR. MARQUAND: We are aware of that Your

1 Honor, and we certainly --

2 JUDGE BECHHOEFER: The Perry case is the
3 one I'm thinking of that was settled, and it was a
4 similar type of complaint, a Notice of Violation.

5 MR. MARQUAND: TVA is certainly amenable
6 to discussing settlement.

7 MR. DAMBLY: And the staff never objects
8 to discussing settlement. I don't quite think this is
9 comparable to the Perry case, Your Honor, but, other
10 than they were both under 50.7. There's a lot more
11 disagreement here about what happened and who did what
12 and if it happened, than in the Perry case.

13 JUDGE YOUNG: Obviously, if you would like
14 to have a Mediation Judge appointed, you could contact
15 Judge Bechhoefer, and he would ask the Chief Judge to
16 appoint someone to help you.

17 JUDGE BECHHOEFER: That has been done in
18 a number of cases. If that were the case, Judge
19 Nottam of the Licensing Board Panel would be
20 appointed. That happened in Perry, as well. I'm sure
21 Mr. Dambly's aware of that.

22 JUDGE YOUNG: Any other?

23 JUDGE BECHHOEFER: Is there any other
24 matters that, now we'll issue a Pre-Hearing Conference
25 Order after we get the transcript. I'm not sure how

1 long that will take, but probably within the next two
2 weeks we'll be able to issue some sort of Pre-Hearing
3 Order. Maybe longer, sometimes transcripts have taken
4 close to two weeks to just get to us.

5 JUDGE YOUNG: But meanwhile, I think the
6 parties have agreed you can go ahead and start
7 Discovery and try to work together to the extent
8 possible. Contact us when there are any disputes and
9 we'll aim for November 14th for a status conference
10 and in the meanwhile, you'll also be discussing these
11 legal issues and seeing if you can narrow those any,
12 and we'll look forward to talking with you around
13 November 14th unless there is a need to earlier.

14 JUDGE BECHHOEFER: Yes, we would still
15 permit the Discovery period to continue until November
16 14th, which is the date specified in your proposal.
17 Not much is going to happen in the holiday season, in
18 any event, but we will decide prior to that, whether
19 we should even aim Summary Disposition Motions, or
20 whether --

21 JUDGE YOUNG: Can't we discuss that on
22 November 14th?

23 JUDGE BECHHOEFER: We will discuss that on
24 November 14th, so we will not set a date right now for
25 the, we will adopt the -- well, the date. The

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1 Discovery termination date, December 14th, which, if
2 that's satisfactory, we'll have the Discovery start
3 earlier. But we will also be amenable to entertaining
4 requests for a delay in responses if parties attorneys
5 are unavailable etcetera. So --

6 JUDGE YOUNG: We probably also, on
7 November 14th, will want to think about a Hearing date
8 and at this time, do we want to sort of get a general
9 target in mind? I don't have my calendar yet for
10 2002, but have you all thought of that?

11 MR. DAMBLY: I haven't got any date in
12 mind myself, Your Honor, and you know.

13 JUDGE YOUNG: Be thinking about it and as
14 I said before, we need to talk about how long --

15 JUDGE BECHHOEFER: When does the weather
16 in Chattanooga get nice?

17 MR. MARQUAND: The end of March.

18 JUDGE BECHHOEFER: Okay. Well, maybe
19 that's the place to go.

20 MR. MARQUAND: I have a question. We were
21 talking about e-mail service on the Board. Since we
22 are somewhat removed from Washington, maybe it would
23 be wise if the parties would serve each other with
24 pleadings and the like by e-mail and we also are
25 somewhat hampered by the mail. If we could agree with

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1 Mr. Dambly that any other documents such as Discovery
2 types that we would exchange by overnight mail, I
3 think that would be helpful to both parties.

4 MR. DAMBLY: I don't have any problem,
5 Your Honor.

6 JUDGE YOUNG: That's fine and then
7 anything that you need to file with us, the courtesy
8 e-mail copies are appropriate. Judge Bechhoefer, do
9 we want to ask for overnight mail on copies or is just
10 regular mail, if we work out the e-mail issue so that
11 we can actually get the, something that's readable by
12 e-mail, there's probably not a reason for --

13 JUDGE BECHHOEFER: Overnight.

14 JUDGE YOUNG: -- for overnight mail.

15 JUDGE BECHHOEFER: Except in unusual
16 circumstances, where we will need the filings at a
17 rapid date, but I don't foresee that right now.

18 MR. MARQUAND: Certainly if we have
19 voluminous Exhibits or documents to be filed that are
20 not subject to being e-mailed, we would anticipate
21 sending those by overnight mail.

22 JUDGE BECHHOEFER: Okay. Great. That
23 will be helpful. So -- let me just check here. Okay,
24 I guess that's just about all we have. Anything on
25 your respective list?

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1 JUDGE COLE: I have nothing further.

2 JUDGE YOUNG: That's fine with me. Nice
3 talking with you all.

4 JUDGE BECHHOEFER: We enjoyed talking with
5 you this morning and we hope the transcript gets out
6 fairly soon and I guess the transcripts eventually
7 appear on ADAMS and I don't know if TVA has any
8 experience in working -- trying to work through ADAMS.
9 It's not always as easy as possible.

10 JUDGE YOUNG: We will, it just occurred to
11 me, we will try to identify a specific person or
12 number that you can call when you need subpoenas.

13 MR. MARQUAND: Great. We appreciate it.

14 JUDGE YOUNG: Okay.

15 JUDGE BECHHOEFER: Give them Alice's
16 number and, when we issue our Pre-Hearing Order, we'll
17 mention the telephone number and the person to call
18 about subpoenas.

19 JUDGE YOUNG: All right.

20 ALL: Thank you. Thank you.

21 (Whereupon the above matter was concluded
22 and went off the record at 11:35 a.m.)
23
24
25

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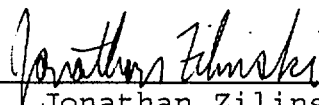
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