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## NUCLEAR REGULATORY COMMISSION

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Title: Tennessee Valley Authority: Watts Barr  
Nuclear Plant Unit 1; Sequoyah Nuclear  
Plant, Units 1 & 2; Browns Ferry Nuclear  
Plant, Units 1, 2 & 3: **Pre-Hearing Conference**

Docket Number: 50-390-CivP et al.

Location: (telephone conference)

Date: Wednesday, November 14, 2001

Work Order No.: NRC-115

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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.
	: 50-390-CivP;
IN THE MATTER OF:	: 50-327-CivP;
TENNESSEE VALLEY AUTHORITY	: 50-328-CivP;
(Watts Bar Nuclear Plant,	: 50-259-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

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Wednesday, November 14, 2001  
Via telephone conference call

The above-entitled matter came on for  
hearing, pursuant to notice, at 10:09 a.m.,

BEFORE:

- CHARLES BECHHOEFER, Chairman
- RICHARD F. COLE, Administrative Judge
- ANN MARSHALL YOUNG, Administrative Judge

1        APPEARANCES:

2                    On Behalf of the Licensee, Tennessee Valley  
3                    Authority,

4                    EDWARD VIGLUICCI, ESQ.

5                    JOHN SLATER, ESQ.

6                    BRENT MARQUAND, ESQ.

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

(10:09 a.m.)

CHAIRMAN BECHHOEFER: This is Charles Bechhoefer, and good morning, Ladies and Gentlemen.

MR. DAMBLY: Good morning, Judge.

MR. VIGLUICCI: Good morning, Judge.

CHAIRMAN BECHHOEFER: This is a pre-hearing conference in the matter of TVA. Let me have the Judges that are with me introduce themselves.

ADMINISTRATIVE JUDGE COLE: This is Richard Cole, Administrative Judge.

ADMINISTRATIVE JUDGE YOUNG: And Anne Marshall Young, Administrative Judge.

CHAIRMAN BECHHOEFER: And for the record, I would like to have all of the parties introduce themselves so that the parties and others who are participating, if any, introduce themselves for the record.

MR. MARQUAND: Judge, this is Brent Marquand, and I am with the Tennessee Valley Authority. I am on the line here, and we have already given our addresses and phone numbers to the court-reporter, but I will let the other three attorneys from TVA introduce themselves as well.

MR. SLATER: Judge, this is John Slater

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1 from TVA.

2 MR. VIGLUICCI: Edward Vigluicci from TVA.

3 MS. MAXWELL: And Barbara Maxwell.

4 MR. DAMBLY: And from the NRC staff, this  
5 is Dennis Dambly.

6 MS. EUCHNER: And Jennifer Euchner from  
7 the NRC staff.

8 CHAIRMAN BECHHOEFER: The purpose of this  
9 conference is more or less a status conference. We  
10 scheduled this during the last or the initial one that  
11 we had, and issued an order the other day summarizing  
12 some of the matters that we were going to take off and  
13 take up.

14 And to go in order on those matters, and  
15 the first is the progress of the parties in resolving  
16 legal issues, including the definition of protected  
17 activities under 10 CFR 50.7, as well as the standard  
18 of proof in dual motive cases, and the relevant  
19 remedies and case law on the subject.

20 And moreover whether we should have  
21 briefings on these subjects. Would the parties like  
22 to tee off on that?

23 MR. MARQUAND: Judge, this is Brent  
24 Marquand. I talked to counsel for the NRC before the  
25 conference began, and we talked about the legal issues

1 that you had mentioned, as well as the summary  
2 judgement matter.

3 And it was our view that the legal issues  
4 that we need to address are part of and would be most  
5 appropriately addressed as part of our motion for  
6 summary judgement, which we intend to file as we  
7 discussed in our previous conference hearing at the  
8 conclusion or after the conclusion of discovery in the  
9 case.

10 And I think that those matters are most  
11 appropriately addressed in the summary judgment  
12 process rather than going through two separate  
13 briefing schedules and trying to brief those legal  
14 issues in a vacuum, but rather address them as part of  
15 the factual context of this case.

16 So what we would propose is that we  
17 proceed with discovery, and complete the discovery,  
18 and then work on our briefing schedules as we had  
19 talked about before, and submit motions for summary  
20 judgment, which would address as appropriate those  
21 legal issues.

22 CHAIRMAN BECHHOEFER: Okay. I take it  
23 that you would not be intending to dismiss because of  
24 any factual issues, because factual issues normally  
25 would not be appropriate unless the parties agree on

1 all the facts.

2 MR. MARQUAND: Well, I think what we are  
3 talking about is that it is our view that given the  
4 facts that are going to be developed in discovery that  
5 summary judgment is appropriate, and that there is not  
6 going to be any undisputed facts which would preclude  
7 dismissal as a matter of law.

8 And I think that we are going to have to  
9 address what the legal issues are, but our view is  
10 that there is not going to be sufficient facts  
11 developed to show a nexus between protected activity  
12 and any adverse action.

13 And our view is that standards of proof to  
14 do motive cases, as well as the burden of proof, is  
15 going to be possibly relevant to our motion for  
16 summary judgment. And we think the best time to  
17 address that is at that point in time."

18 ADMINISTRATIVE JUDGE YOUNG: I'm sorry,  
19 but I didn't hear the last thing you said. You think  
20 what?

21 MR. MARQUAND: We think that the legal  
22 issues are best addressed in the context of our motion  
23 for summary judgment.

24 ADMINISTRATIVE JUDGE YOUNG: I understand  
25 that. I just did not understand the last phrase that

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1 you said, that it was not relevant to anything.

2 MR. MARQUAND: Well, I think it was the  
3 same thing. I think I was saying that the legal  
4 issues need to be developed in the context of the  
5 motion for summary judgment, rather than in a vacuum  
6 along with the facts of the case.

7 CHAIRMAN BECHHOEFER: Does the staff agree  
8 with that?

9 MR. DAMBLY: The staff doesn't have a  
10 problem addressing it in that context. The staff  
11 would not have a problem addressing it before either.  
12 I don't know that the facts will make that much  
13 difference.

14 I mean, the law is going to be what the  
15 law is, and as to what the standard is and what is  
16 protected activity, that is not going to change,  
17 depending on what facts we develop.

18 But I think addressing it there, if they  
19 are going to file a motion for summary judgment,  
20 obviously the staff disagrees that there will be no  
21 question of fact left for the Board to decide.

22 ADMINISTRATIVE JUDGE YOUNG: This is Judge  
23 Young. We received the parties joint proposed  
24 schedule.

25 ADMINISTRATIVE JUDGE COLE: The one dated

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1 July 17th. This is Judge Cole.

2 ADMINISTRATIVE JUDGE YOUNG: And has  
3 anything changed in that?

4 MR. MARQUAND: Judge, this is Brent  
5 Marquand from TVA again. I think the parties are  
6 working towards the completion of discovery right now,  
7 and the staff has taken three depositions, and is  
8 proposing to take another dozen.

9 We need to take two depositions before the  
10 conclusion of discovery, and we need to -- I don't  
11 know whether you want an oral request or a written  
12 request, but we need two subpoenas for those two  
13 deponents.

14 But we believe that we can conclude  
15 discovery somewhere around the 15th, maybe by the --  
16 the 15th of December, and it may take a little longer,  
17 depending on where these deponents are that we need to  
18 subpoena. But I think we will certainly have  
19 discovery concluded by the first of the year, and  
20 prepared to go forward with the motion for summary  
21 judgment.

22 I don't have the schedule in front of me,  
23 but I think it said by February 14th for the motion  
24 for summary judgment.

25 CHAIRMAN BECHHOEFER: I thought it said

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1 December 14th for the end of discovery, and February  
2 1st for --

3 MR. MARQUAND: Was it February 1? Okay.  
4 I didn't have it as that.

5 ADMINISTRATIVE JUDGE COLE: That was on  
6 the joint proposed schedule, and this is Judge Cole.

7 CHAIRMAN BECHHOEFER: Yes. Let me just  
8 check here when -- well, December 14th.

9 MR. MARQUAND: Well, if I could, what I  
10 would request is that we extend discovery until the  
11 end of December, and that we extend the summary  
12 judgment to the end of February.

13 Ms. Maxwell, Mr. Slater, and I all have  
14 large trials in the middle of January, and they have  
15 a large Department of Labor case the week of the 14th,  
16 and I have another one the week of the 22nd. I think  
17 all those cases are going to take a week or longer to  
18 try. So we are going to be tied up in trial that  
19 month, the month of January.

20 ADMINISTRATIVE JUDGE YOUNG: What is the  
21 staff's response to that? This is Judge Young.

22 MR. DAMBLY: We don't have a problem with  
23 that, Your Honor. This is Mr. Dambly again, I'm  
24 sorry.

25 ADMINISTRATIVE JUDGE YOUNG: Another thing

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1 that I would like to ask the parties in the context of  
2 another case, and I was looking back at the  
3 Commission's guidance on the conduct of adjudicatory  
4 proceedings.

5 And I don't have it in front of me, but I  
6 seem to recall that one of the things that the  
7 Commission said was that motions for summary judgment  
8 -- that they should not be allowed if they would serve  
9 primarily to delay the proceedings.

10 I don't hear any disagreement with your  
11 plans about a summary judgment motion from the staff,  
12 but if any further discussion of the issues at this  
13 point might simplify them, then that might be  
14 appropriate.

15 But then sometimes summary judgment  
16 motions can help move along a proceeding, and I am  
17 sure that it is TVA's position that it would end this  
18 proceeding if we ruled in your favor.

19 But the other times when it is pretty  
20 clear that there are significant differences on what  
21 the facts are with regard to a particular issue, it  
22 really can delay a proceeding. Where are you in your  
23 development of the facts, such that you can address it  
24 up to this point?

25 MR. MARQUAND: Your Honor, this is Brent

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1 Marquand again. I agree with you that frequently they  
2 do delay a proceeding, but they can also narrow the  
3 issues or permit the necessity for a hearing.

4 Our view is that in this case that the  
5 reason that we intend to file a motion for summary  
6 judgment is that we don't think it is necessary to  
7 have a hearing.

8 What my experience is in dealing with good  
9 attorneys on the other side of the case is that when  
10 you file motions for summary judgment, the first thing  
11 you get back from them is we need to take discovery  
12 from these people because we need to have the  
13 opportunity to respond to see if there are any factual  
14 issues which would preclude summary judgment.

15 And I certainly understand Mr. Dambly's  
16 and Ms. Euchner's request to depose all the people  
17 that they have proposed to take. I certainly think it  
18 is reasonable, and I certainly think that they would  
19 have to depose all those people in response to a  
20 motion for summary judgment.

21 But I don't see any way around filing the  
22 motion after we complete the discovery, because there  
23 simply would become a request to take discovery in  
24 response to the motion.

25 ADMINISTRATIVE JUDGE YOUNG: And your

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1 motion is limited to the issue of the connection  
2 between --

3 MR. MARQUAND: Not entirely, Judge. That  
4 is a major issue, but we are dealing with timeliness  
5 matters here, and not timeliness as far as the statute  
6 of limitations, but timeliness as to whether or not it  
7 allows the drawing of an inference of discrimination.

8 And the remoteness in time between the  
9 protected activity and the alleged adverse action does  
10 not allow the drawing of an inference of  
11 discrimination. I think the Supreme Court has  
12 recently ruled on that.

13 And in that case it was a situation where  
14 it was maybe a few months, and they cited all kinds of  
15 cases saying that even a few months is too long. In  
16 our case, I think we are dealing with a situation  
17 involving several years.

18 ADMINISTRATIVE JUDGE YOUNG: Which case  
19 are you talking about, which Supreme Court case?

20 MR. MARQUAND: Is it Clark versus Breedon,  
21 John?

22 MR. SLATER: Your Honor, this is John  
23 Slater, and it is Clark versus Breedon, which was  
24 handed down last term.

25 ADMINISTRATIVE JUDGE YOUNG: And when you

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1 talk about that, and just to see if we can clarify  
2 that a little bit maybe -- and this is Judge Young  
3 again.

4 When you talk about remoteness, it seems  
5 like I recall from our last discussion that there was  
6 some talk of the activities that are asserted to be  
7 protected activities starting as early as 1991, and  
8 then subsequent to that, there were additional  
9 complaints or filings with the Department of Labor  
10 maybe in 1993 and 1996.

11 Is there still an issue about whether  
12 there was protected activity or what that is, or are  
13 you all in agreement on that at least?

14 MR. MARQUAND: No, he did file Department  
15 of Labor cases, and those of course are protected  
16 activity. The issue that we had talked about in 1991  
17 had to do with what Mr. Fizer at one point claimed as  
18 protected activity.

19 And depending on whether the staff intends  
20 to rely upon Mr. Fizer, and I am not sure which  
21 version of Mr. Fizer's, but the version which Mr.  
22 Fizer claimed that his -- that certain statements that  
23 he made were protected, if they intend to rely on  
24 those as protected activity, there is going to need to  
25 be some factual development, as well as addressing

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1 whether or not that is protected activity.

2 But I don't know that we have had a clear  
3 statement from staff as to whether or no they intend  
4 to rely on those 1991 statements to the Nuclear Safety  
5 Review Board as protected activity.

6 ADMINISTRATIVE JUDGE YOUNG: Mr. Dambly or  
7 Ms. Euchner, do you want to address that?

8 MR. DAMBLY: I believe, Your Honor, that  
9 we do intend to rely on both the filing of the  
10 complaints of DOL, and various activities that Mr.  
11 Fizer engaged in back in the '91 and '92, and '93 time  
12 frame -- I don't remember the exact dates -- concerned  
13 with raising issues about the chemistry program and  
14 various problems that were there. So, yes, we would  
15 intend to rely on that other than the filing of the  
16 complaint.

17 MR. MARQUAND: What I am specifically  
18 referring to -- and so that we are not passing in the  
19 night here -- is that in one of Mr. Fizer's statements  
20 in one of the Department of Labor complaints, he  
21 claimed that he had -- that when the Nuclear Safety  
22 Review Board met at Sequoyah and criticized the  
23 chemistry department and its failure to provide  
24 certain parameters to the operations department, Mr.  
25 Fizer --

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1 ADMINISTRATIVE JUDGE YOUNG: Mr. Marquand,  
2 did you say that the NSRB had criticized --

3 MR. MARQUAND: Yes.

4 ADMINISTRATIVE JUDGE YOUNG: -- or that  
5 Fizer had criticized?

6 MR. MARQUAND: No, he was criticized by  
7 the NSRB -- well, not he or himself personally, but  
8 the chemistry department was criticized by the Nuclear  
9 Safety Review Board, TVA to NSRB.

10 And Mr. Fizer's response, who was the head  
11 of the chemistry department, was that he was not going  
12 to do that. He was not going to make an effort to  
13 provide certain chemistry parameters.

14 And at one point in time, it was Mr.  
15 Fizer's view that that was protected activity; and my  
16 query is whether or not the staff intends to rely upon  
17 that as protected activity, or whether they are  
18 referring to other matters that he raised regarding  
19 the chemistry department.

20 ADMINISTRATIVE JUDGE YOUNG: One thing  
21 that I have down here and that I think I would  
22 encourage you to do is ask you proceed with discovery  
23 to talk with each other about what the facts are, and  
24 about the theories that each of you are developing.

25 And if that becomes clear that the

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1 likelihood of us finding that there are undisputed  
2 facts sufficient to even consider in your legal  
3 argument, that you might want to reconsider filing  
4 summary judgment motions, and instead file as many  
5 stipulations of fact as possible. And then file  
6 prehearing briefs on the legal issues.

7 MR. MARQUAND: I think that is a good  
8 idea, Judge.

9 (Discussion off the record.)

10 ADMINISTRATIVE JUDGE YOUNG: As I was  
11 saying, I was encouraging the parties to continue the  
12 discovery process and to be talking with each other  
13 about your versions of the facts, and try to develop  
14 those to the point where you can ascertain the degree  
15 of which you agree on particular facts.

16 And to try to come to stipulations of fact  
17 on as many things as possible, and if it becomes clear  
18 that there is not going to be any agreed upon facts,  
19 such that summary judgment would even begin to be  
20 appropriate, think about rather than filing summary  
21 judgment motions to filing stipulations of facts to  
22 the degree possible.

23 And then filing prehearing briefs on the  
24 legal issues, because if there is a dispute of fact,  
25 then that pretty much make the summary judgment

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1 process more a delaying process, rather than something  
2 that would move things along.

3 And we could still -- I think the parties  
4 could still sort of flush out your legal positions and  
5 prehearing briefs, and stipulations of fact, and that  
6 would render the hearing a more efficient process. Is  
7 that what I said before?

8 MR. MARQUAND: It is, and I think that is  
9 a good idea. This is Brent Marquand again.

10 ADMINISTRATIVE JUDGE YOUNG: All right.  
11 And I hear TVA saying that you are agreeing that might  
12 work. Mr. Dambly and Ms. Euchner, does that sound  
13 reasonable to you?

14 MR. DAMBLY: We have no problem with that,  
15 Your Honor.

16 ADMINISTRATIVE JUDGE YOUNG: And it sounds  
17 like you are working well together, and so as you  
18 continue the discovery process you might be thinking  
19 in that vein. Do we agree then that we should give  
20 them until the end of December to finish their  
21 discovery?

22 CHAIRMAN BECHHOEFER: Yes. We do have a  
23 calendar to put a particular date on that?

24 ADMINISTRATIVE JUDGE YOUNG: December  
25 31st, I would presume.

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1 MR. MARQUAND: December 31st is a Monday.

2 CHAIRMAN BECHHOEFER: That's okay.

3 ADMINISTRATIVE JUDGE YOUNG: It strikes me  
4 that even though the month of January is going to be  
5 pretty full, that it might be good to either have a  
6 status conference or get a status report from the  
7 parties in early January, if possible, to determine  
8 whether -- which would be the most appropriate route  
9 to follow from that point.

10 CHAIRMAN BECHHOEFER: Well, candidly, you  
11 had asked for what, the end of February for summary  
12 disposition?

13 MR. MARQUAND: Yes, Your Honor. February  
14 28th is a Thursday.

15 ADMINISTRATIVE JUDGE YOUNG: Was it  
16 January that was pretty much taken up for all the  
17 attorneys? I don't recall all the time lines there.

18 MR. MARQUAND: Well, let's see. John,  
19 your trial is the 14th.

20 MR. SLATER: This is John Slater. Barbara  
21 Maxwell and I have a trial that is going to start on  
22 January 14th, and the Federal District Judge has set  
23 aside two weeks for that case.

24 And then we are going to be basically out  
25 of pocket from mid-December through that time getting

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1 witnesses and what not prepped and ready to go. So we  
2 are going to be pretty much out of pocket for 45 days  
3 until -- or 30 days until the beginning of the trial,  
4 and then two weeks after that.

5 ADMINISTRATIVE JUDGE YOUNG: What about  
6 Mr. Marquand and Ms. Vigluicci?

7 MR. MARQUAND: This is Mr. Marquand. I  
8 have got a trial that starts the 22nd of January, and  
9 we have four days slated for trial. And it is going  
10 to take more than four, but we can have the first four  
11 days, and then we are going to have to reschedule the  
12 other part of it.

13 I don't know how my schedule is going to  
14 work out, but I can participate in a conference call  
15 about any other week during January. And, Ed, I don't  
16 know --

17 MR. VIGLUICCI: Judge, this is Edward  
18 Vigluicci, and I am not a litigation attorney. I am  
19 counsel to the Nuclear Program, and so I act as a  
20 resource to the litigation attorneys, and I will  
21 operate on their schedule.

22 ADMINISTRATIVE JUDGE YOUNG: How about  
23 either the first or second week of January, or the 7th  
24 of January; the week of the 1st of January or the 7th  
25 of January.

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1 CHAIRMAN BECHHOEFER: The week of the 1st  
2 would probably not be good for me.

3 ADMINISTRATIVE JUDGE YOUNG: The week of  
4 the 7th then?

5 MR. MARQUAND: That would be fine for me,  
6 Your Honor.

7 MR. DAMBLY: And the week of the 7th is  
8 fine for us, Your Honor.

9 ADMINISTRATIVE JUDGE YOUNG: And to the  
10 9th?

11 MR. MARQUAND: That sounds good.

12 MR. DAMBLY: The 9th is fine, Your Honor.

13 ADMINISTRATIVE JUDGE YOUNG: Which is a  
14 Wednesday. And the same time?

15 MR. MARQUAND: That sounds good.

16 MR. DAMBLY: Yes, Your Honor.

17 ADMINISTRATIVE JUDGE YOUNG: And should we  
18 count --

19 CHAIRMAN BECHHOEFER: Well, that's just  
20 tentative, and if anybody has any problems. It looks  
21 like January 9th, at 10:00 a.m., would be  
22 satisfactory, but it can be changed. We will record  
23 it as that, but it can be moved.

24 ADMINISTRATIVE JUDGE YOUNG: Well, let's  
25 not encourage moving it at all. Let's encourage

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1 keeping it, and what I would like to hear from the  
2 parties at that time is what progress you have made on  
3 working together to determine to what degree that  
4 there are facts not in dispute or in dispute, such  
5 that summary judgment motions would be inappropriate  
6 next step, okay?

7 MR. MARQUAND: Yes, Your Honor.

8 MR. DAMBLY: That is okay with the staff,  
9 Your Honor. But I missed the first part of that. You  
10 broke off. What is the first thing that you wanted us  
11 to work together on?

12 MR. MARQUAND: To work together to develop  
13 the undisputed facts.

14 MR. DAMBLY: Undisputed facts? Okay.

15 ADMINISTRATIVE JUDGE YOUNG: And as far as  
16 the summary judgment motions, and whether they would  
17 be an appropriate next step or not.

18 CHAIRMAN BECHHOEFER: Then perhaps we  
19 should set March 1st, which is a Friday, as the  
20 tentative date for filing summary disposition motions.  
21 Is that satisfactory with the parties? That will give  
22 you an extra day.

23 MR. MARQUAND: That's fine, Your Honor.

24 MR. DAMBLY: That's fine.

25 CHAIRMAN BECHHOEFER: And it may turn out

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1 that we don't need it at all, but --

2 ADMINISTRATIVE JUDGE YOUNG: Well, if we  
3 don't need summary judgment motions, and it may turn  
4 out not to be the most appropriate way to go, and that  
5 might be a good day to use for pretrial briefs  
6 deadlines for both parties.

7 CHAIRMAN BECHHOEFER: Well, by March 1.

8 ADMINISTRATIVE JUDGE YOUNG: Right.

9 CHAIRMAN BECHHOEFER: Well, it may serve  
10 two purposes.

11 ADMINISTRATIVE JUDGE YOUNG: And just  
12 before we move on from there, the issues that we  
13 listed -- the definition of protected activities, and  
14 the standard of proof, and the relevant case law --  
15 were there any other areas of law that we left out  
16 that either party sees as being relevant in this case?

17 MR. DAMBLY: I don't think so, Your Honor.  
18 This is Dennis Dambly from the staff.

19 MR. MARQUAND: You know, I think that the  
20 summary of the issues in the pre-conference order  
21 pretty much covers what we had talked about before.  
22 This is Brent Marquand.

23 ADMINISTRATIVE JUDGE YOUNG: Okay.  
24 Thanks.

25 CHAIRMAN BECHHOEFER: And then next matter

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1 is should we tentatively try to set dates for an  
2 evidentiary hearing or is it still too early to do  
3 that? And for both of you for furnishing a summary of  
4 witness' testimony or a summary of what they are going  
5 to address, plus documents that you would be relying  
6 on, and which documents.

7 We had asked for that earlier, and in our  
8 earlier conference we would still like to have that,  
9 but do you think it is premature for that, or should  
10 we wait until our next conference in January?

11 MR. MARQUAND: Your Honor, I am pretty  
12 much free, except that I have a previous commitment  
13 over spring break next year, and I'm sorry, but I  
14 don't know when that is. So with the exception of  
15 that week, I am free to set the trial date or anything  
16 else we need.

17 MS. MAXWELL: This is Barbara Maxwell.  
18 Spring break is from March 23rd through the end of  
19 that week, which I believe is the 29th.

20 MR. MARQUAND: So he 23rd through the  
21 29th? Okay. And I don't have a problem waiting until  
22 January for a conference call to set our schedules for  
23 witnesses and the like. In fact, I think the parties  
24 pretty much know who the witnesses are already based  
25 on the discovery that we are taking.

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1 CHAIRMAN BECHHOEFER: Let me inquire. I  
2 have only had one request for a subpoena.

3 MR. MARQUAND: Right.

4 CHAIRMAN BECHHOEFER: And should I expect  
5 many others?

6 MR. MARQUAND: This is Brent Marquand with  
7 TVA. Do you want an oral request, or can we request  
8 them now en blank and we can fill them out, or do we  
9 need to tell you who, what, where, and when?

10 Well, we need two subpoenas for two  
11 people, and as I understand it the staff needs one  
12 more, or I guess two more, or three more.

13 MS. EUCHNER: I think we need two more;  
14 one for Barker and one for Harvey.

15 MR. MARQUAND: Well, you have already got  
16 one that you have served on Easley.

17 MR. DAMBLY: right.

18 CHAIRMAN BECHHOEFER: It is the only one  
19 that I have received. In view of the fact that at  
20 least we need a showing of general relevance, the  
21 method that the staff used to get Mr. Easley's  
22 subpoena would be an appropriate method.

23 MR. MARQUAND: All right.

24 CHAIRMAN BECHHOEFER: I would prefer not  
25 to issue blank subpoenas.

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1 MR. MARQUAND: Then we will send you a  
2 motion or a letter outlining who we want and why.

3 CHAIRMAN BECHHOEFER: Okay. Just general  
4 relevance. It is not a very stringent criteria.

5 MR. MARQUAND: Well, one of them is Mr.  
6 Fizer himself, and so I don't think that anybody is  
7 going to dispute is relevance.

8 ADMINISTRATIVE JUDGE YOUNG: So does that  
9 mean that you have found him?

10 MR. MARQUAND: Well, I think -- well, we  
11 have a phone number, but I don't think he is lost. He  
12 quit the TVA and continued to live in Chattanooga,  
13 Tennessee, as far as I know.

14 ADMINISTRATIVE JUDGE YOUNG: All right.  
15 I thought there was some question about not knowing  
16 where he was.

17 MR. MARQUAND: I think the preliminary  
18 responses would list where we believe he is anyway.

19 ADMINISTRATIVE JUDGE YOUNG: Okay. Good.

20 MR. MARQUAND: And if he is not there, we  
21 will find him.

22 ADMINISTRATIVE JUDGE YOUNG: So I am  
23 hearing that we want to try to look to holding the  
24 hearing in March, assuming we don't get summary  
25 judgment motions?

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1 MR. MARQUAND: Yes, assuming that we don't  
2 -- well, I anticipate filing a motion. I do not see  
3 that not happening, but I guess there is that  
4 possibility.

5 MR. DAMBLY: This is Denis Dambly from the  
6 staff. March is fine for a hearing for us.

7 ADMINISTRATIVE JUDGE COLE: AS long as we  
8 avoid the period March 23rd through the 29th, correct?

9 MR. DAMBLY: Right.

10 CHAIRMAN BECHHOEFER: Judge Cole and  
11 myself each have a hearing scheduled for April 2 in  
12 New London. It could change, but we have that  
13 tentative hearing set.

14 MR. MARQUAND: Well, we might as well do  
15 it in the middle of April. It's really pretty then.

16 ADMINISTRATIVE JUDGE YOUNG: Of course.  
17 The cherry blossoms are out here, too."

18 MR. MARQUAND: That's right.

19 CHAIRMAN BECHHOEFER: I am just saying  
20 that right now we have a hearing scheduled for April  
21 2 in Connecticut.

22 ADMINISTRATIVE JUDGE YOUNG: Well, let's  
23 see how things develop, and I for myself strongly  
24 encourage you to be able to tell us as much as  
25 possible your progress, or to try and make as much

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1 progress as possible in nailing down each's party's  
2 version of the facts, and where you agree and where  
3 you disagree.

4 I think that would be of great assistance  
5 in planning the progress of the case from that point  
6 forward. And we might also note that the March 1st  
7 date would be tentative as well, and it might be moved  
8 forward into February, depending upon what progress  
9 you have made.

10 CHAIRMAN BECHHOEFER: This is Judge  
11 Bechhoefer. I am not sure that can be moved up too  
12 much more. I personally would like to see a copy of  
13 the OI report that has been very much involved in this  
14 case.

15 But if anybody objects, I would withhold  
16 that. Otherwise, I would like to have the staff I  
17 guess mail me a copy, and to redact to the extent  
18 necessarily of the OI report. But if TVA objects to  
19 me seeing it, so be it.

20 MR. MARQUAND: Would it become part of the  
21 record, Judge?

22 CHAIRMAN BECHHOEFER: No, it wouldn't,  
23 until somebody introduces it, or seeks to introduce  
24 it.

25 MR. MARQUAND: Well, I don't know what Mr.

1 Dambly's view of it is, but our view is that we want  
2 to use the OI report from the standpoint that we think  
3 it is very flawed.

4 And I don't know if Mr. Dambly intends to  
5 use it or not, or whether he believes that is the  
6 staff's position any longer, but we certainly would  
7 want to use the report at the hearing, and don't have  
8 any problem with you having it. And I am not sure  
9 about the appropriateness of having it redacted.

10 MR. DAMBLY: This is Mr. Dambly for the  
11 staff. I guess I have a couple of questions. One is  
12 that when you say the OI report, are you speaking of  
13 the report itself, or the report and the voluminous  
14 attachments that go along with it, which is a whole  
15 bunch of -- it is basically a whole bunch of  
16 depositions taken by OI and other documentary staff.  
17 And TVA and IG reports, and I don't know what else.

18 MR. MARQUAND: He is talking about the  
19 investigative record that made up the report.

20 MR. DAMBLY: Well, I don't know what he is  
21 talking about. Judge Bechhoefer?

22 CHAIRMAN BECHHOEFER: Yes.

23 MR. DAMBLY: What do you want, the report  
24 itself, with I don't know how many pages -- 30 or 40  
25 maybe of that; or do you want the 300 or 400 or more

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1 pages, and it may be much more than that actually,  
2 which has all the statements that were taken, and all  
3 that stuff?

4 MR. MARQUAND: Your Honor, I guess we are  
5 starting now to talk about submitting things to the  
6 Board that aren't going to be necessarily part of the  
7 record, and I am wondering whether the appropriateness  
8 of the Board considering or the panel considering  
9 matters outside of what is going to be the record.

10 ADMINISTRATIVE JUDGE YOUNG: This is Judge  
11 Young. I would agree. I think that anything that we  
12 receive or consider in the case really does need to be  
13 made part of the record.

14 And I would encourage that with anything  
15 like this, if the parties are in agreement, I would  
16 say that it be handled by you submitting it as a  
17 stipulated exhibit, or whatever you want to call it.

18 But I think you are right. I think it  
19 does need to be on the record if we are going to  
20 consider it.

21 CHAIRMAN BECHHOEFER: At this stage, I  
22 think that I would like to at least see the OI report,  
23 and not necessarily the attachments or appendices, or  
24 whatever they are termed, so that I can develop my  
25 knowledge a little bit more about whether it would be

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1 useful for me to see at least the report.

2 And if either side wishes to put it into  
3 evidence, then they could do that. It would not  
4 become part of the record solely when it is sent to  
5 myself or the board for perusal. Now, this doesn't  
6 mean that we wouldn't entertain a request for  
7 inclusion.

8 MR. MARQUAND: Your Honor, Judge Young had  
9 talked about stipulations, and you had, too. Why  
10 don't I develop a stipulation and run it by counsel  
11 for the staff, that includes references to the report,  
12 and we could attach it as an exhibit to the  
13 stipulation, and submit that as part of the record in  
14 the case?

15 ADMINISTRATIVE JUDGE YOUNG: That would be  
16 a good idea.

17 MR. DAMBLY: This is Dennis Dambly for the  
18 Staff. I don't know -- well, maybe to address an  
19 earlier question of Mr. Marquand's, and I think a  
20 subject that we had addressed in the first prehearing  
21 conference. As far as I am concerned, the OI report  
22 will not be a part of the record.

23 It is not necessarily the staff's  
24 position. It was OI's investigative position, but the  
25 staff -- there is a lot more than OI, and takes into

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1 account other things, and whatever our position is, is  
2 not necessarily that reflect in the OI documents.

3 So I don't know why it would come in. Mr.  
4 Marquand has stated that he intends to show that they  
5 did a lousy job I guess or words to that effect, and  
6 that is what we discussed the first time around as  
7 being totally irrelevant to the case.

8 The case is whether Mr. Fizer  
9 discriminated against or wasn't he discriminated  
10 against, and not whether OI did a good, bad, or  
11 indifferent job.

12 CHAIRMAN BECHHOEFER: Well, the notice of  
13 violation does specifically note the OI investigation  
14 report.

15 MR. DAMBLY: It notes that we relied on  
16 that, and all the other information that we had, and  
17 not necessarily the conclusions drawn by OI.

18 ADMINISTRATIVE JUDGE YOUNG: Mr. Dambly,  
19 this is Judge Young. Just in terms of making the  
20 record clear, do you object to -- well, do you object  
21 to trying to work with Mr. Marquand and the TVA  
22 lawyers to come up with some stipulation with regard  
23 to this, or are you objecting to it being provided at  
24 all?

25 MR. DAMBLY: Well, I guess if the Board

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1 wants it, I don't object to providing it, although I  
2 think in an enforcement action that it is appropriate  
3 for the Board to sit as a fact finding body, and  
4 listen to the evidence presented de novo, and make a  
5 decision not to read reports beforehand and come to  
6 some possible premature conclusion about what the  
7 evidence is going to show.

8 I don't know what stipulations -- I mean,  
9 if Mr. Marquand wants to work on stipulations that  
10 says that the report has the following statements in  
11 it, I don't know --

12 ADMINISTRATIVE JUDGE YOUNG: Well, Judge  
13 Bechhoefer wants to see the report to get a better  
14 understanding of the case, and for myself, I don't  
15 really have any particular desire to see the report in  
16 advance, but if it is submitted, I would suggest that  
17 it be submitted in some filing such that it is in the  
18 record.

19 And if you can come up with a stipulation,  
20 then that would be the preferable way to do it. And  
21 that stipulation could include any caveats or  
22 limitations on it, in terms of how you wish it to be  
23 considered.

24 My suggestions are made merely to try to  
25 make sure that procedurally and for purposes of making

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1 clear what is in the record, that things are done in  
2 a way that that is apparent.

3 MR. MARQUAND: We can certainly make our  
4 best stab at putting a stipulation together that both  
5 parties can live with, with respect to that.

6 ADMINISTRATIVE JUDGE YOUNG: And this is  
7 Judge Young again. I do think that I want to make  
8 clear, and I think Judge Cole and Judge Bechhoefer  
9 would agree with me, that Mr. Dambly is absolutely  
10 right.

11 It is a de novo proceeding and  
12 determinations are to be made based solely on what is  
13 presented in the hearing, and on what is in the  
14 record. So the parties can make your arguments on  
15 that in whatever direction you wish to take them.

16 MR. MARQUAND: But as I understand it the  
17 staff is bound by the position they have taken below.  
18 They can't proceed on some new theory. They have to  
19 defend the action they have taken.

20 ADMINISTRATIVE JUDGE YOUNG: That is not  
21 my understanding of what a de novo proceeding is. In  
22 a de novo proceeding the staff is bound by the notice  
23 of violation and allegations that it makes.

24 MR. MARQUAND: Right.

25 ADMINISTRATIVE JUDGE YOUNG: But there

1 might be some circumstances in which things that had  
2 happened before would be relevant in a narrow context.  
3 But this is not an appeal on that record. This is a  
4 de novo proceeding that will be based on the evidence  
5 presented at the hearing of this proceeding.

6 MR. MARQUAND: My point I guess was that  
7 the staff has to proceed on the notice of violation  
8 that they issued, and on the basis that the notice of  
9 violation states.

10 CHAIRMAN BECHHOEFER: I might say that the  
11 notice of violation includes an explicit reference to  
12 the investigation of the OI and the report of the OI.

13 ADMINISTRATIVE JUDGE YOUNG: It sounds to  
14 me -- this is Judge Young again, but it seems to me  
15 that at the very least this is sort of bringing out a  
16 potential issue that might focus later.

17 So to the degree that we need to talk  
18 about here, maybe we should. And to the degree that  
19 the parties need to talk about it later, and report  
20 back to us at our next conference call, I think you  
21 may need to do that.

22 But if there is some basic fundamental  
23 disagreement on what the hearing is all about, maybe  
24 it is better to surface that as soon as possible, and  
25 now if possible.

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1           Mr. Dambly, I think you raised the issue  
2 of it being a de novo proceeding first, and how do you  
3 see this issue as stated by Mr. Marquand?

4           MR. DAMBLY: I guess I am not sure or  
5 follow what the issue is, but I see the proceeding as  
6 being that the notice of violation bounds or shows for  
7 what the hearing would be held on. And to the extent  
8 that that violation says TVA discriminated against Mr.  
9 Fizer when they reduced him or forced him, or sent him  
10 to the whatever -- and I don't have that in front of  
11 me unfortunately, but to the services organization,  
12 that is the issue.

13           And that is was that discrimination or  
14 wasn't that. It says that we looked at the OI report,  
15 and we looked at various prehearing -- well, not  
16 prehearing, but pre-decisional enforcement  
17 conferences, and whatever data we gathered.

18           One should not take the fact that we  
19 looked at the OI report to mainly agree with its  
20 conclusions or otherwise. The OI report, as mentioned  
21 in there, would include several hundred pages, I  
22 think, of basically depositions that OI took and the  
23 stuff that is in those.

24           We don't necessarily have to agree with  
25 their conclusions. We look at, if you will, the hard

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1 evidence that they put together in developing whatever  
2 they did. And they may say there was discrimination,  
3 and we could say no.

4 They could say no and we could say yes  
5 based on looking at the actual testimony and documents  
6 that have come up, and what we will be relying on is  
7 the testimony of witnesses.

8 I don't intend to just introduce  
9 depositions. I don't think that would be appropriate  
10 from the OI report, and I am not sure again that --  
11 well, Mr. Marquand seems to want to say that they  
12 disagree with OI's conclusions on various things, and  
13 therefore that is somehow an issue in this case. I  
14 don't see it being an issue at all.

15 CHAIRMAN BECHHOEFER: The notice of  
16 violation specifically refers to the OI report.

17 MR. DAMBLY: As one basis for the  
18 information that we used to reach the conclusion that  
19 we reached.

20 MR. VIGLUICCI: This is Edward Vigluicci  
21 from TVA. I have the notice of violation in front of  
22 me, and the statement is that as a result of the NRC  
23 Office of Investigations report issued on August 4,  
24 1999, a violation of NRC requirements was identified,  
25 in accordance with the general statement of policy,

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1 and it goes on to say that the premise is that this is  
2 in accordance with the OI investigation report, dated  
3 August 4th, 1999.

4 And that is the N.O.V. that is written and  
5 posted, and that we posted across the site that we are  
6 required to do.

7 ADMINISTRATIVE JUDGE YOUNG: And so  
8 T.V.A.'s position with regard to that, maybe you could  
9 repeat that, either Mr. Vigluicci or Mr. Marquand.

10 MR. MARQUAND: We certainly think that it  
11 is relevant to look at what the NRC considered as a  
12 basis for their violation. I understand that they --  
13 and I tend to agree with them that they have to prove  
14 the violation by evidence in this de novo proceeding  
15 that it is appropriate to proceed with witnesses  
16 rather than simply dumping the administrative record  
17 into the record.

18 But the theories of discrimination that  
19 the staff issued the N.O.V. on, that is the only basis  
20 for the theory of discrimination we have seen is what  
21 is in the violation, as well as what is in the report.

22 And if they have some other theory that  
23 they are proceeding on, I think it is incumbent upon  
24 them to let us know what that theory is.

25 ADMINISTRATIVE JUDGE YOUNG: Let me see if

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1 I can --

2 MS. MAXWELL: I don't know if this is  
3 helpful or not. This is Barbara Maxwell with TVA. In  
4 the EEO arena, frequently a de novo hearing is held at  
5 trial where there has been an EEO investigative  
6 report.

7 And that report comes in as evidence. It  
8 is not conclusionary, but it is admissible as  
9 evidence, and the weight of which is determined by the  
10 trier of fact. So I would assume that this would be  
11 similar here.

12 ADMINISTRATIVE JUDGE YOUNG: You are  
13 talking about an EEO proceeding?

14 CHAIRMAN BECHHOEFER: Right. In the Title  
15 VII cases, the Supreme Court has indicated that the  
16 investigative record is something that can be  
17 considered. Certainly it is the basis for the  
18 decision below, and of course in this case the  
19 decision below is what the staff has to defend.

20 ADMINISTRATIVE JUDGE YOUNG: But in this  
21 situation, I guess we are in the odd position of the  
22 staff not wanting to rely on it, and TVA wanting to  
23 bring it in to point out flaws in it, is the way that  
24 I believe you prove it.

25 And I guess what I was trying to get at is

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1 whether this disagreement between the parties on  
2 whether it should be provided to the board, and at  
3 what point, and in what manner.

4 And again I would encourage the parties to  
5 try to come to some agreement on how this is done, and  
6 if there is a disagreement on it, let's hear what the  
7 disagreement is. I think we understand the parties'  
8 positions on it.

9 The staff is saying that any mistakes that  
10 may or may not have been made at the investigation  
11 stage does not limit the staff in any way, but the TVA  
12 is saying that somehow if there were flaws that those  
13 might be relevant to disproving the allegations made  
14 by the staff in the notice of violation. Am I over-  
15 simplifying this?

16 MR. MARQUAND: I think that is a fair  
17 statement, and we can certainly work on trying to get  
18 to a stipulation, and if we can't get to one, then we  
19 can brief it as to how it should be considered or  
20 whether it should come in.

21 CHAIRMAN BECHHOEFER: All I wanted to see  
22 was the basic report itself, which underlies the  
23 entire proceedings as far as I can see, and this  
24 doesn't mean that we will necessarily rule that the  
25 report is relevant or anything else.

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1           But since it has been relied on  
2 extensively, I think it would be useful for the board  
3 to at least see it. And I am not saying all the  
4 attachments, but a copy of the report I think would be  
5 useful in helping us to understand what the case is  
6 all about.

7           MR. MARQUAND: Well, let us try to work on  
8 a stipulation, Your Honors.

9           ADMINISTRATIVE JUDGE YOUNG: That sounds  
10 fine.

11           CHAIRMAN BECHHOEFER: And as I said, I  
12 have in mind right now only the report, and not all  
13 the attachments, but be that as it may.

14           MR. MARQUAND: We understand.

15           ADMINISTRATIVE JUDGE YOUNG: Mr. Dambly  
16 and Ms. Euchner, does that sound all right with you,  
17 in terms of how to proceed from this point?

18           MR. DAMBLY: We don't have a problem with  
19 that, Your Honor. I mean, I am sure that we can work  
20 out a stipulation if you all want to see the report  
21 itself, and it is not that we don't intend to rely on  
22 it.

23           I don't intend to introduce it in evidence  
24 because I don't think that it is evidence. It is the  
25 OI investigative conclusions, and I don't think that

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1 belongs in the record. But I would be glad to provide  
2 it. I mean, if that is what the Board wants, we can  
3 provide it to you.

4 It is my understanding in a de novo  
5 proceeding that the issue is who said what to who, and  
6 not what the OI investigator said.

7 ADMINISTRATIVE JUDGE YOUNG: If you need  
8 to make your decisions on how to proceed, not based on  
9 what you construe the Board to be asking for, Judge  
10 Bechhoefer raised the issue -- and I don't think you  
11 should do anything based on your understanding that  
12 the Board is asking for anything. I don't think the  
13 Board is asking for anything, per se.

14 CHAIRMAN BECHHOEFER: Well, in any event,  
15 at least this Judge would find it useful if we could  
16 read the report prior to going to the hearing, which  
17 again if offered into evidence, we will rule on it  
18 then.

19 MR. DAMBLY: Your Honor, maybe this will  
20 help. This is Mr. Dambly again, but I think to the  
21 extent that I understand what you want to see the  
22 report for, I think when we filed the pre-hearing  
23 briefs, all the facts and issues will be laid out  
24 there before the hearing to give you an understanding  
25 of where everybody is coming from. And it may obviate

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1 the need for seeing this report itself, but that is  
2 just a suggestion.

3 ADMINISTRATIVE JUDGE YOUNG: In any event,  
4 I encourage the parties to include this issue to the  
5 degree that you maintain any disagreement about it in  
6 your consultations with each other on trying to narrow  
7 the issues in the stipulation if that is possible. Is  
8 there anything else that we needed to cover?

9 CHAIRMAN BECHHOEFER: Well, we did raise  
10 or have an issue, but the possibilities of settlement,  
11 and that always should be considered, and the  
12 Commission always sorts of encourages that.

13 ADMINISTRATIVE JUDGE YOUNG: Good point.

14 CHAIRMAN BECHHOEFER: So, have the parties  
15 tried to settle the issue at all up to this time?

16 MR. DAMBLY: This is Mr. Dambly for the  
17 staff. At this point, I don't think we have had any  
18 settlement discussions. It may be when discovery is  
19 over that it would be a more appropriate point to talk  
20 about that.

21 CHAIRMAN BECHHOEFER: Well, okay. We are  
22 just inquiring. I think the Commission always wants  
23 us to consider settlement.

24 ADMINISTRATIVE JUDGE YOUNG: On January 9,  
25 maybe you can give us an update on that, and whether

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1 you think that is possible?

2 MR. MARQUAND: Yes, Your Honor.

3 MR. DAMBLY: Yes, Your Honor.

4 ADMINISTRATIVE JUDGE YOUNG: Okay.

5 CHAIRMAN BECHHOEFER: Okay. So I guess  
6 that's it. Is there anything else that any party  
7 wishes to raise at this point? Otherwise, we will  
8 conclude the conference.

9 MR. MARQUAND: Nothing from this end, Your  
10 Honor.

11 MR. DAMBLY: We have nothing further, Your  
12 Honor.

13 CHAIRMAN BECHHOEFER: I will issue a  
14 general order summarizing the conference once we get  
15 the transcript, which is 3 days, I think it is, and  
16 once it is set to us. So, with that, I guess we will  
17 sign off.

18 (Whereupon, the hearing was concluded at  
19 11:09 a.m.)

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CERTIFICATE

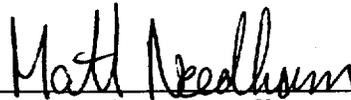
This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:

Name of Proceeding: Tennessee Valley Authority  
Pre-Hearing Conference

Docket Number: 50-390-CivP et al.

Location: (Telephone Conference)

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken by me and, thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.



Matthew Needham  
Official Reporter  
Neal R. Gross & Co., Inc.