

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	Docket Nos. 50-390-CivP; 50-327-CivP
TENNESSEE VALLEY AUTHORITY)	50-328-CivP; 50-259-CivP
(Watts Bar Nuclear Plant, Unit 1)	50-260-CivP; 50-296-CivP
Sequoyah Nuclear Plant, Units 1 & 2)	
Browns Ferry Nuclear Plant, Units 1, 2 & 3))	
)	ASLBP No. 01-791-01-CivP
)	
)	EA 99-234

NRC STAFF RESPONSE TO
TENNESSEE VALLEY AUTHORITY'S MOTION IN LIMINE

INTRODUCTION

This proceeding involves a violation of 10 C.F.R. § 50.7 by the Tennessee Valley Authority (TVA) for retaliating against Gary Fiser for engaging in protected activities. Pursuant to the Atomic Safety and Licensing Board's (Board) Fourth Prehearing Conference Order of February 13, 2002, motions in limine were due on April 4, 2002, with responses due on April 8, 2002. The Nuclear Regulatory Commission (NRC) Staff hereby requests the Board deny TVA's motion to exclude the testimony of Brent Marquand and Edward Vigluicci and certain documents and other evidence as requested by TVA.

BACKGROUND

On April 4, 2002, TVA filed an "Emergency Motion for Extension of Time," in which it requested permission to file its motion in limine in this proceeding. This motion claimed that TVA was experiencing technical difficulties and needed until 12:00 P.M. on April 5, 2002 to file its motion in limine. TVA waited until after 11:00 P.M. on April 4, 2002 to make this request. TVA then filed its motion in limine, with accompanying brief, declarations, and order just prior to 12:00 P.M. on April 5, 2002. Although the Staff has not filed a formal objection to TVA's request for an extension

of time, the Staff would like to note that TVA's delay in filing deprived the Staff of valuable time necessary to respond to the motion. In setting deadlines for responses, the Board limited both parties to two business days to respond to motions in limine. The Staff filed its motions in limine at approximately 5:00 P.M. on April 4, 2002, thus giving TVA the full time allotted by the Board in which to prepare its response. TVA did not extend the same courtesy to the Staff, instead filing its brief a half a business day late.

DISCUSSION

The Board should deny TVA's motion to exclude the testimony of Edward Vigluicci and Brent Marquand because each of those individuals has information relevant to the matters at issue in this proceeding. The Staff takes no position as to the ethical considerations of Marquand continuing as trial counsel in this proceeding despite his testimony as a witness. The Board should deny TVA's motion to exclude the compact disc enhancements of Gary Fiser's tape recorded conversations and the transcripts of those enhanced discs because they contain information relevant to the matters at issue in this proceeding. Finally, the Staff does not object to the exclusion of the documents identified by TVA in its motion to exclude, provided that the Board permit the Staff to use those documents in the event a TVA witness testifies in a manner that demonstrates the relevance of those documents.

- A. The Board should not exclude the testimony of Edward Vigluicci because he has information relevant to the matters at issue in this proceeding

TVA asserts that the Board should exclude the testimony of Vigluicci because the Staff failed to identify him as a witness in its responses to TVA's interrogatories of August 3, 2001 and December 21, 2002. The Staff did not include Vigluicci in its responses because it had not at those times determined that he would be called as a witness. The Staff did not make final determinations as to its witness list until drafting its March 29, 2002 "NRC Staff Proposed Witness List." The Staff considered the implications of calling a TVA attorney as a witness in this

proceeding, but determined that Vigluicci's statement that he had drafted responses to a letter from Senator Sasser was relevant to the matters at issue in this proceeding.

During the deposition of Thomas McGrath, counsel for the Staff questioned McGrath as to whether he had ever seen the letter to Senator Sasser sent by Fiser, William Jocher, and D.R. Matthews. McGrath denied that he had seen such a letter or that he had seen any responses to that letter. During a recess from the deposition, Vigluicci stated to counsel for NRC Staff that he had drafted a response to the Sasser letter. Vigluicci's statement clearly indicates that he has some personal knowledge of relevant issues, as required by Federal Rule of Evidence 602. If Vigluicci drafted any of the responses to the Sasser letter, as he indicated to counsel for the Staff, then he would also have information about from what individuals he gathered information related to the allegations in the letter. As a result of his statement to counsel for the Staff, the Staff requested TVA to provide any responses to the Sasser letter which Vigluicci had drafted. TVA provided three responses to Senator Sasser from TVA OIG, but failed to identify which, if any, of these responses Vigluicci had drafted. Now that the Staff identified Vigluicci as a witness with regard to his involvement in the drafting of responses to the Sasser letter, Vigluicci has decided to deny that he made such a statement to Staff counsel.

TVA claims that the responses to the Sasser letter were prepared and reviewed by TVA Office of the Inspector General (OIG), which is independent from other TVA organizations. As an initial point, the Staff questions whether TVA OIG acts independently from other TVA organizations, and specifically from the Office of the General Counsel. The Staff is not proposing to call Vigluicci as a witness in order to harass TVA counsel. The Staff would never have placed Vigluicci on its proposed witness list, nor would it have requested from TVA copies of responses drafted by Vigluicci if Vigluicci had not first volunteered to the Staff that he had drafted such responses. If Vigluicci wishes to deny that he made such a statement to counsel for the Staff, he should be required to do so at the proceeding under oath and under penalty of perjury. Requiring Vigluicci

to make such a denial under oath at the proceeding would not create difficulties for TVA unrelated to the matters at issue in this proceeding.

- B. The Board should not exclude the testimony of Brent Marquand because he has information relevant to the matters at issue in this proceeding

TVA also asserts that Marquand's testimony should be excluded because the Staff failed to identify him as a witness in its interrogatory responses. The Staff did not identify Marquand in those responses because it had not yet determined that Marquand should be a witness. After a complete review of the evidence, especially deposition testimony, the Staff determined that Marquand's testimony was necessary. The Staff considered the implications of calling TVA trial counsel as a witness in this proceeding, but determined that the need for his testimony outweighed such considerations.

TVA asserts that Marquand's testimony regarding his advice to Labor Relations and Human Resources regarding whether Fiser's 1994 settlement agreement with TVA guaranteed him a position is uncontested, and therefore his testimony is unnecessary. TVA denies that Marquand was one of the relevant decision makers with regard to whether the Chemistry Program Manager position should be posted. TVA bases this argument on the fact that TVA Human Resources had already concluded that the Chemistry position should be posted and that Marquand was merely giving legal advice on an inquiry limited to whether the 1994 settlement agreement guaranteed Fiser a continued position at TVA. This argument ignores two basic facts. First, in the McGrath Predecisional Enforcement Conference held on November 22, 1999, Marquand told the NRC that he advised Human Resources to post the Chemistry position. Specifically, Marquand stated that "my advice was that the right thing to do was to post the position and to proceed with the selection without regard to whether he filed the previous DOL complaint." Enforcement Conference at 43. Second, had Marquand determined that Fiser was entitled to the Chemistry position as a result of his settlement agreement, presumably Human Resources would not have posted the position and

instead would have placed Fiser in that position. Under these circumstances, it is disingenuous for TVA to suggest that Marquand's legal advice did not make him one of the relevant decision makers in the determination to post the Chemistry position.

TVA suggests that Marquand's testimony on this point is unnecessary because Katherine Welch from Labor Relations can testify as to his legal advice and because TVA is willing to stipulate to the legal advice given. TVA cannot dictate to the Staff what witnesses to call in order to prove its case at hearing. The Staff did not list Welch as a witness and had no intention of calling her as a witness. The Staff should not be forced to call her as a witness because Marquand would prefer not to testify. Welch's testimony would be limited to what Marquand told her, whereas Marquand could testify as to his rationale for reaching the conclusion that Fiser's 1994 settlement agreement did not guarantee him a position. Although TVA argues that the better person to testify would be the person receiving the legal advice, the Staff disagrees. The best person to testify as to the legal advice and its rationale would be the person who decided what the legal advice would be and what the basis was for that legal advice.

TVA also argues that testimony regarding Marquand providing copies of a transcript of the Fiser recordings is uncontested and therefore does not require his testimony. TVA is correct that McArthur could testify as to Marquand providing him such a transcript and advising him to be sensitive of the fact that Fiser was taping conversations with his colleagues. McArthur's knowledge is limited, however, to any conversations he had with Marquand regarding the taping. The Staff seeks to question Marquand as to all individuals he had such conversations with regarding Fiser's taping, and not simply his conversations with McArthur. Additionally, the Staff believes that informing TVA employees of Fiser's recordings, along with advice to be careful around Fiser, may in itself constitute a violation of 10 C.F.R. § 50.7 under the rationale of *Earwood v. Dart Container Corp.*, 93-STA-0016 (Secy Dec. 7, 1994). The Staff has the right to question Marquand regarding such a potential violation.

The Staff notes that if TVA had responded to Interrogatories 8 and 9 of the "NRC Staff's Second Set of Interrogatories," which requested information related to Marquand's interactions and advice with TVA employees regarding the Fiser tapes, it might not have been necessary for the Staff to call him as a witness to testify as to this matter. Since Marquand improperly asserted attorney-client privilege and work product with regard to the Staff's interrogatories, he cannot now complain that he had no knowledge that his behavior was at issue in this proceeding.

Finally, the Staff would like to note that it has not identified Marquand as a witness in order to harass and distract counsel from preparation for the hearing in this case. The Staff considered the potential effect that calling TVA counsel as a witness could have, and determined that Marquand had relevant information which required his testimony.

C. The Staff takes no position as to the ethical considerations of Brent Marquand continuing his representation of TVA in this proceeding

The Staff will not make a motion to remove Marquand as trial counsel in this proceeding as a result of his testimony. The Staff takes no position as to the ethical considerations of Marquand continuing such representation under Tennessee Disciplinary Rules DR 5-101 and DR 5-102. Any ethical considerations with respect to Marquand's continuation as trial counsel must be resolved between Marquand and his client and in no way involve the Staff.

D. The Board should not exclude the enhanced recordings of the Fiser tapes because they contain information relevant to the matters at issue in this proceeding

TVA asserts that the compact disc enhancements of Fiser's tape recorded conversations should be excluded because the Staff did not provide them to TVA prior to identifying them as exhibits and because the recordings are poor and transcripts unreliable. The Board should deny TVA's motion to exclude both the compact discs and the transcripts. The Staff did not provide TVA the discs and the transcripts earlier because the Staff did not yet have the discs and the transcripts. The Staff is waiting for the enhancement of the original tapes to be completed, and plans to provide

the remaining enhancements and transcripts as it receives them.¹ TVA has had copies of the Fiser tapes for at least eight years, and in fact attempted to enhance the tapes itself at one point. The fact that TVA failed to effectively enhance the tapes while the Staff was able to effectively enhance the tapes is not an adequate reason to exclude the compact discs.

TVA cites three cases in support of its motion to exclude the tape enhancements and transcripts. None of those cases would prohibit the admission of the enhanced tapes in this proceeding. In *United States v. Robinson*, 707 F.2d 872 (6th Cir. 1983), the court held that the trial court abused its discretion by admitting tapes into evidence because the tapes “were so inaudible as to preclude transcription.” *Id.* at 879. The court also stated that the jury should not have been given the transcripts of the tapes because the jury relied upon the transcripts of the tapes as evidence, rather than using them as an aid in understanding the tapes. Specifically, the court stated that:

the tapes [must] be authentic, accurate and trustworthy. Moreover, they must be audible and sufficiently comprehensible for the jury to consider the contents. Recordings will be deemed inadmissible if the “unintelligible portions are so substantial as to render the recording as a whole untrustworthy.”

Id. at 876 (citations omitted). In *United States v. Segines*, 17 F.3d 847 (6th Cir. 1994), the court admitted a composite tape of the intelligible and relevant conversations from six original tapes, but concluded that the jury should not have been provided the transcript. TVA also cited *United States v. Scarborough*, 43 F.3d 1021, 1024 (6th Cir. 1994) for the proposition that where the parties

¹ The Staff notes that TVA is in no position to complain about the late receipt of documents. As stated in the Staff’s “Motion in Limine to Exclude the Testimony and Summary of Analyses of Carey L. Peters and Request for Permission to File Further Motions in Limine,” TVA did not provide voluminous documents to the Staff until the date on which motions in limine were due. The Staff also just received additional documents from TVA on April 8, 2002. TVA has filed two supplemental exhibit lists, providing the documents on those lists to the Staff after filing the lists. Since TVA is also still in the process of providing documents and supplemental exhibit lists to the Staff, it should not complain that the Staff will be filing a supplemental exhibit list upon receipt of the remaining enhanced recordings and transcripts.

cannot stipulate to the accuracy of the transcripts, they can only be used if the trial court confirms the accuracy of the transcripts.

The Fiser tapes, their enhancements, and the transcripts can be used in this proceeding under each of the above cases. First, each of those cases involved the admission of tapes and the use of transcripts as an aid by the jury. The courts were concerned that the jury would view the transcript as evidence, rather than simply using them as an aid to listening to the tapes admitted into evidence. Since this proceeding is before an administrative tribunal rather than a jury, there is no concern that the Board will view the transcript as the evidence rather than the tapes themselves.

TVA argues that the tapes and the enhancements are inaudible and therefore should be excluded from evidence. The Staff disagrees with TVA's assertion that all of the recordings are inaudible. Although some of the conversations are not perfectly clear, the Staff had little difficulty in understanding the majority of the recorded conversations. Under these circumstances, the Board should not exclude all of the recordings, but instead make a case-by-case determination as to whether the conversations the Staff seeks to use at the proceeding are sufficiently audible. The conversations which the Staff considers most relevant to the matters at issue in this proceeding are sufficiently audible as to be admitted into evidence.²

TVA also argues that the transcripts of the recordings are not accurate reflections of the recorded conversations, and therefore both the recordings and the transcripts should be excluded. In *Segines*, the court refused to overturn the trial court's decision to admit a composite tape of the relevant conversations even though the tape was not sufficiently intelligible to be transcribed.

² Specifically, Fiser recorded conversations with Wilson McArthur in which McArthur stated that Thomas McGrath had previously made negative statements about Fiser as the Sequoyah Chemistry Manager. Additionally, McArthur told Fiser that the message TVA management sent to its employees was to not report problems, and that TVA views employees who go to court as troublemakers. These conversations are clearly relevant to the matters at issue in this proceeding, and should be admitted into evidence.

17 F.3d at 855. Even if the Board determines that the enhancements are not sufficiently intelligible to be transcribed and declines to use the transcripts as an aid, the Board may still listen to the recorded conversations and admit them into evidence. The Staff will stipulate that the Board should not admit the transcripts into evidence, but believes that the transcripts will aid the Board in listening to the taped conversations. Therefore, the Board should permit the use of the transcripts for that limited purpose.

Gary Fiser can testify as to the accuracy and authenticity of the enhanced recordings by comparing them to his original tapes. The requirement of authentication or identification as a condition precedent to the admissibility of evidence in an NRC proceeding is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 365 (1983), *citing* Fed. R. Evid. 901(a). One method of authenticating or identifying evidence is for a witness with knowledge to testify that the matter is what it is claimed to be. Fed. R. Evid. 901(b)(1). Since Fiser recorded the conversations and kept a personal transcript of the conversations, his testimony should be sufficient to authenticate that the tapes and their enhancements are the conversations he claims to have recorded in 1992 and 1993. The Staff will provide copies of the original tapes and of TVA's enhanced tapes at the Board's request if the Board decides that they are necessary to make an adequate comparison of the enhancements.

E. The Staff does not object to the exclusion of the noted grievance, selection, and reduction-in-force policies provided that TVA witnesses do not testify in a manner which implicates the use of those policies in the Fiser matter

The Staff does not object to the exclusion of the documents identified by TVA in section B.2 of its motion in limine. The Staff included those documents as exhibits because TVA provided those documents in response to document requests from the Staff related to such policies. The Staff recognizes that the May 1997 reduction-in-force instructions and outside candidate selection policy were issued after the events at issue in this proceeding. Although the Staff does not object

to the exclusion of these documents, the Staff requests that the Board permit the Staff to use these documents in the event that a TVA witness testifies to the use of such documents. Regarding the document for "Grievance Arguments," the Staff acknowledges that TVA has represented that the positions that Fiser held and the position he sought were not subject to a collective bargaining agreement. The Staff requests that the Board permit the Staff to use this document in the event that TVA witness testifies that any of Fiser's positions or the position he sought were covered by a collective bargaining agreement.

CONCLUSION

The Staff requests that the Board deny TVA's motion to exclude the testimony of Edward Viglucci and Brent Marquand. Each of these individuals has testimony relevant to the matters at issue in this proceeding. The Staff should not be required to accept second-hand testimony when the individuals with first-hand knowledge are available to testify. The Staff takes no position as to whether Marquand can continue as trial counsel for TVA under the Tennessee Disciplinary Rules. The Board should deny TVA's motion to exclude the enhancements of the Fiser tapes and the transcripts because the conversations recorded on those tapes contain information relevant to the matters at issue in this proceeding. The Staff will stipulate that the transcripts may not be admitted into evidence, but may only be used by the Board to aid in its listening of the recordings. Finally, the Staff does not object to the exclusion of the grievance arguments, outside candidate selection policy and reduction-in-force policy, but requests the Board permit the Staff to use those documents to the extent that TVA witnesses testify in a manner that implicates their use.

Respectfully submitted,

/RA/

Jennifer M. Euchner
Counsel for NRC Staff

Dated at Rockville, Maryland
this 8th day of April, 2002.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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) EA 99-234

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO TENNESSEE VALLEY AUTHORITY'S MOTION IN LIMINE" in the above-captioned proceeding have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), or by electronic mail as indicated by a double asterisk (**) on this 8th day of April, 2002.

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