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NUCLEAR REGULATORY COMMISSION

DEPUTY SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Title: Tennessee Valley Authority
Watts Bar 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; ASLBP No.: 01-791-01-CivP

Location: (teleconference)

Date: Tuesday, April 9, 2002

Work Order No.: NRC-319

Pages 199-261

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

PRE-HEARING CONFERENCE

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-----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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Tuesday, April 9, 2002

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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1 APPEARANCES:2 On Behalf of the Licensee, Tennessee Valley
3 Authority,

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On Behalf of the Nuclear Regulatory Commission:

DENNIS C. DAMBLY, ESQ.

JENNIFER M. EUCHNER, ESQ.

Office of General Counsel

Nuclear Regulatory Commission

Room 15 E2

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ALSO PRESENT:

NICHOLAS HILTON, NRC/OE

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

2 (10:00 a.m.)

3 JUDGE BECHHOEFER: Good morning, ladies
4 and gentlemen. This is a pre-hearing conference, I
5 guess we called it, in the proceeding involving -- let
6 me introduce the members of the board first.

7 Richard, introduce yourself.

8 JUDGE COLE: Richard Cole, Administrative
9 Judge.

10 JUDGE YOUNG: Ann Young, Administrative
11 Judge, Ann Marshall Young.

12 JUDGE BECHHOEFER: We would appreciate, by
13 the way, when anybody speaks to introduce themselves
14 first. Identify themselves first, I should say. We
15 should have all the parties or participants identify
16 themselves at this stage. I'll start with TVA, I
17 guess.

18 MR. MARQUAND: This is Brent Marquand and
19 John Slater. We represent TVA. We're located right
20 now in Knoxville, Tennessee.

21 MR. BIGLIUCCHI: This is Ed Bigliucchi,
22 Office of General Counsel, TVA as well.

23 MR. REPKA: This is David Repka, counsel
24 to TVA. I'm with Winston and Strawn and I'm located
25 in Washington, D.C.

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1 JUDGE BECHHOEFER: And staff.

2 MR. DAMBLY: For the staff, this is Dennis
3 Dambly along with Jennifer Euchner and Nick Hilton.

4 JUDGE BECHHOEFER: Mr. Hilton, could you
5 just identify yourself?

6 MR. HILTON: Yes. This is Nick Hilton.
7 I'm with the Office of Enforcement.

8 JUDGE BECHHOEFER: Well, pending are
9 several motions. The board has actually reached a
10 decision on several of them already. I would like Ed
11 Young to summarize the ones we are all in agreement
12 on.

13 JUDGE YOUNG: Okay. First of all, NEI's
14 motion to file an amicus brief, we have agreed that we
15 will consider that. That motion is granted.

16 With regard to the staff's motion in
17 limine with regard to Mr. Peters and certain documents
18 related to Mr. Grover, we would deny those motions.
19 With regard to Mr. Peters, we agree with TVA that any
20 objections would go to the weight to be given that.
21 The staff can through cross-examination of Mr. Peters
22 bring out any weaknesses in his statistical analysis.

23 With regard to Mr. Grover and the
24 documents related to him, and we may need to go
25 through them. I think there was a memorandum to Mr.

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1 Grover, two memoranda, a termination letter, Mr.
2 Grover's BOL and EEO complaints, and then finally the
3 OIG report.

4 Of those documents, I think probably the
5 one that I personally would have the most problem with
6 would be the OIG report because that kind of thing
7 generally has a lot of hearsay in it. It's not
8 generally admissible under ordinary rules of evidence.

9 But we are persuaded by TVA's argument
10 that with regard to bias and also credibility and
11 given the generally relaxed rules of evidence in
12 administrative proceedings that all of those would be
13 admitted on the issues of bias and credibility.

14 Do you want to add something?

15 JUDGE BECHHOEFER: Yes. We believe that
16 the circumstance that led to the information
17 concerning Mr. Grover arose after the transaction
18 involved in this proceeding does not preclude that
19 testimony or document because they show a tendency
20 toward bias, or they may show that. It is something
21 we should consider. The fact that it arose after the
22 fact ought to preclude our, at least, hearing it.

23 JUDGE YOUNG: Obviously when the staff
24 calls Mr. Grover, you can bring out any testimony to
25 sort of rehabilitate his credibility and counter any

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1 evidence based on bias. With regard to --

2 MR. DAMBLY: Your Honor, this is Dennis
3 Dambly for the staff. Just so I'm clear on this, the
4 board -- I mean, to the extent you are going to allow
5 the IG report in, the board is not going to make
6 determinations on whether that's true or false, just
7 the fact that there is a report out there that says he
8 did something wrong? Otherwise, we are going to need
9 about 10 or 15 more witnesses and a bunch of subpoenas
10 and you're going to have to try a second case.

11 JUDGE YOUNG: I think with regard to the
12 report, as I said before, that is the kind of thing
13 that I would generally exclude. In my previous job as
14 an Administrative Law Judge in Tennessee in which I
15 heard a lot of personnel cases, that is the kind of
16 thing that would not come in under the rules of
17 evidence because it generally has a lot of hearsay in
18 it.

19 We're in sort of a different situation
20 here because the rules of evidence are relaxed. I
21 wouldn't give much, if any, weight to hearsay
22 contained within such a report. It may be that once
23 we see it, that we would entertain additional
24 objections to portions of it as being unreliable
25 hearsay.

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1 The degree to which that kind of thing
2 would be taken by us to find that Mr. Grover was
3 credible or not credible or biased or unbiased is
4 something that is sort of difficult to tell you at
5 this point without seeing what it is. It may be that
6 you want to go ahead and provide that report to us.

7 If you have already provided it, I
8 apologize and I just haven't looked at it. Then
9 consider separately any particular objections to
10 portions of it that might be objectionable as sort of
11 hearsay within hearsay kind of thing.

12 MR. DAMBLY: Again, Judge, this is Dennis
13 Dambly. My point was we're not going to object at
14 this point if the sole purpose that the document will
15 come in for us to say the TVA OIG did an investigation
16 and they made some conclusions.

17 But if the board is going to go into or
18 hear argument or whatever from TV that they are true,
19 then we have a whole other trial that is going to take
20 place and there is a separate enforcement action being
21 considered at the moment on whether or not that IG
22 report itself was an act of discrimination. I think,
23 you know, if you're going to get into that, then we
24 are going to need a couple extra weeks of trial and a
25 whole bunch more witnesses and discovery.

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1 As long as it's only coming in to say they
2 did a report and they said he did some bad stuff and
3 that would make him upset with them, that's fine. But
4 to any extent that you're going to judge on the
5 truthfulness of those allegations, then we've got
6 serious problems and it's going to be a lot longer and
7 I need 10 or 15 more witnesses and a whole boat load
8 of documents.

9 JUDGE YOUNG: Let's come back to this in
10 just a minute and I would like to ask Mr. Marquand to
11 address your concerns. Maybe we should go straight to
12 that. I have a feeling that this may take a little
13 while so it might be good for me to finish recounting
14 what the board has discussed with regard to the
15 motions in limine and then come back to that and hear
16 from Mr. Marquand and Mr. Repka, if appropriate, in
17 terms of what TVA intends to show through that report.

18 Also we may look at whether there is some
19 alternative way of approaching that particular part of
20 the documents related to Mr. Grover because that one
21 is the one that is of most concern.

22 With regard to the staff motion in limine
23 -- I'm sorry. With regard to TVA's motion in limine
24 relating to the personnel policies, I think the staff,
25 Mr. Dambly, you've said that you don't have any

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1 problem not introducing them at the outset as long as
2 you can bring them in if any TVA witnesses makes them
3 relevant to their testimony. We don't see any problem
4 with proceeding in that manner. That sounds like that
5 sort of works itself out. If anyone has any problem
6 with that, why don't you go ahead and state it at this
7 point.

8 MR. MARQUAND: I think that is a
9 reasonable approach, Your Honors. This is Brent
10 Marquand of TVA.

11 JUDGE YOUNG: Okay. With regard to the
12 tape recordings and transcripts of tape recordings
13 that Mr. Fizer made, we think that the best approach
14 is to allow them in considering the transcripts only
15 as guidance, but also to allow to make sure that TVA
16 has all of those so that TVA can provide any
17 corrections or make clear any disagreement that TVA
18 has with how it was transcribed, what is on those
19 tapes.

20 If it turns out that they are so inaudible
21 that they are not useful, then obviously that would go
22 to the weight that we would give them. But without
23 hearing them, we feel that the tapes would be
24 admissible and that we would consider the transcripts
25 as guidance, but with those being provided to TVA

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1 right away if they have not already.

2 MR. MARQUAND: Your Honor, we still don't
3 -- we've got two transcriptions and we don't have
4 anything else. We gave to the tapes to the staff ages
5 ago in discovery. I don't know why they are doing
6 this the 11th hour but we don't have them.

7 There is one particular conversation in
8 there that is if it was audible, it would be very
9 pertinent. That hasn't been provided and I don't know
10 if there was any attempt to transcribe it.

11 MS. EUCHNER: Your Honor, this is Ms.
12 Euchner for the staff. We just received yesterday
13 more CDs. We will be having them transcribed and we
14 will be providing copies to TVA. The problem is we
15 haven't received all these enhanced CDs yet and that's
16 why TVA doesn't have them.

17 As for waiting for the last minute, this
18 is the federal government. It took us a while to get
19 the appropriate funding to take care of this and the
20 enhancement takes a while. We apologize to TVA that
21 they don't have them all yet but they are in the same
22 boat we are. We don't have them all yet and we will
23 certainly make sure we provide them to them as soon as
24 we get them.

25 MR. MARQUAND: Your Honor, I don't have

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1 any problem with the way the board wants to proceed
2 with the tapes with the caveat that the first hurdle,
3 it seems to me, that has to be crossed is whether the
4 tapes, or enhanced CDs, are sufficiently audible to
5 have any weight. At that point a determination can be
6 made whether they should be relied upon. And then a
7 second hurdle has to be whether the transcripts, as
8 NRC staff admitted in their response, are of any value
9 or not.

10 JUDGE YOUNG: I think the approach that we
11 would like to take -- let me back up for one second
12 and say to the staff, whatever you need to do to get
13 those in and the minute you get them in, we want you
14 to provide copies to TVA through Federal Express
15 overnight mail, whatever method would get them to TVA
16 as quickly as possible or hand carry them over to Mr.
17 Repka's office along with any transcripts and be
18 advised that time is of the essence here. We are
19 getting close to the hearing date.

20 Obviously if it got to the point that
21 something became so prejudicial to TVA that they only
22 received it the very last day, then we would have to
23 look at either some way to mitigate any prejudice or
24 consider either allowing them at that point would be
25 inappropriate.

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1 I think our general approach is allow the
2 tapes in, allow TVA full opportunity to provide their
3 own transcriptions or corrections to any
4 transcriptions that the staff makes. Above all, get
5 these done and to both parties as quickly as is
6 humanly possible. If you need to expedite something,
7 do that.

8 COURT REPORTER: I'm sorry to interrupt.
9 This is the reporter. Who was speaking directly
10 before Judge Young, please?

11 MR. MARQUAND: This is Brent Marquand from
12 TVA.

13 COURT REPORTER: Thank you very much.

14 JUDGE YOUNG: Thanks.

15 JUDGE BECHHOEFER: This is Judge
16 Bechhoefer. I might have been --

17 JUDGE YOUNG: I don't think you were but
18 what did you want to say? Judge Bechhoefer is just
19 pointing out that the staff says that portions of it
20 are audible. Obviously that is what will determine
21 the weight that we give them. We want to give TVA
22 full opportunity to challenge any parts of them.

23 Mr. Marquand, in response to your
24 statement of needing to make the separate ruling,
25 again I think that we will consider any objections

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1 that should be given to these and that weight would
2 start at zero and go to 100 and wherever we find it
3 appropriate would be the appropriate weight we would
4 give them.

5 I think probably we will allow the
6 parties, if not require the parties, to oppose
7 findings of fact and conclusions of law after the
8 conclusion of the hearing so that we can have full
9 benefit of all your arguments on all these issues.

10 Now, this leaves us with things that we
11 need to talk about, that we think we need to talk
12 about, and then if either of you see any other
13 subjects that we need to address this morning, we will
14 put those on our list.

15 First, to go back to the issue of the OIG
16 report, on TVA's OIG report on Mr Grover, we want to
17 hear from Mr. Marquand what he would intend to prove
18 by that. Maybe you should also address whether there
19 is any other means by which you can bring that
20 information out other than through an investigative
21 report which would not generally be admissible for
22 reasons other than the relevance and so forth.

23 Then the other big issue obviously is the
24 testimony of Mr. Marquand and Mr. Bigliucchi. We
25 would like to hear a bit more from the parties both in

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1 terms of arguments in response to each other's filings
2 including TVA's response to the staff, response to
3 TVA's motion in limine.

4 Also with regard to what the actual
5 testimony would be because it appears to us that you
6 are not on the same page with regard to what that
7 testimony would be. Rather than wait until the
8 hearing to clarify that, we think that an efficient
9 use of everyone's time would be to clarify that at
10 this point so that we could make a better informed
11 ruling on that.

12 So are there any other subjects that
13 anyone thinks we need to address today that we may
14 have overlooked or that may have presented themselves
15 since the filings that we have received?

16 MR. DAMBLY: Your Honor, this is Dennis
17 Dambly for the staff. There are requests from TVA for
18 subpoenas for two witnesses, Carolyn Evans and William
19 McNulty. Ms. Evans is an NRC employee and Mr. McNulty
20 was the Field Office Director or OI in Region II at
21 the time and is being called for his NRC testimony.

22 As you are aware, the board can't issue
23 subpoenas to NRC staff or require any special person
24 to testify. Moreover, I don't think the testimony is
25 relevant at all. I mean, they are not witnesses. I

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1 understand that they supposedly are to authenticate
2 documents and I didn't know we had any authentication
3 problems.

4 I'm not sure what their testimony would be
5 for but it's not proper for the board to issue
6 subpoenas for specific NRC employees absent some
7 showing that nobody else could provide whatever it is
8 that is necessary out of them. They are not fact
9 witnesses at all.

10 JUDGE YOUNG: Why don't we take those up
11 right away? It seems like a relatively simple thing
12 to establish, Mr. Marquand. If someone else besides
13 Mr. Marquand needs to speak to this, feel free. Do
14 you need either one of those witnesses to do anything
15 other than authenticate documents?

16 MR. MARQUAND: Let me tell you what I
17 intend to call each of them for and the staff can
18 address it. Ms. Evans is a lawyer in Region II. She
19 provided the legal advice or the analysis to OI of
20 their investigation of Mr. Fizer's 1993 allegations.
21 The staff provided to us her legal opinion as to that.

22 Apparently they intended to waive that,
23 whatever privilege there was. Her legal opinion was
24 that Mr. Fizer had not engaged in protected activity
25 with respect to anything to establish his '93

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1 complaint. But, on the other hand, she said it
2 appeared that management -- that he had disagreements
3 with management over whether or not he had performance
4 issues.

5 In her view, he had been removed from his
6 position because of performance issues, even in his
7 own opinion. We intend to call her to establish that
8 that is the opinion she rendered and that is the
9 opinion she gave to OI which they relied upon in
10 closing the investigation of the 1993 complaint.

11 With respect to Mr. McNulty, he was, as I
12 understand it, the Field Director of OI responsible
13 for investigating Mr. Fizer's '96 allegation. The
14 factual investigator is not available to testify and
15 we have questions about why they didn't address
16 certain matters including:

17 Why they didn't even look at the 1993
18 investigation? why they made certain representations
19 about the 1993 DOL complaint when they had not even
20 looked at the 1993 DOL file. Why they characterized
21 the 1993 complaint in a certain fashion when they
22 didn't even look at it.

23 We have a lot of questions about why they
24 did what they did, the conclusions that they made.
25 The OI investigation and the court continues to be

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1 relevant in this case because it was expressly relied
2 upon by the staff when issued the NOV.

3 JUDGE YOUNG: Let me just address, first
4 of all, one issue and see if we can get that out of
5 the way. That is, this proceeding is a de novo
6 proceeding and I think it is fairly basic that we're
7 not really looking at how well the staff did what the
8 staff did.

9 We have to base our decision on the
10 evidence we hear at this proceeding. Whether the
11 staff did or did not do something appropriately or did
12 or did not give appropriate attention to particular
13 evidence is really not relevant in this case.

14 With regard to Evan's legal opinion --
15 before we move on to that, I sort of see Judge Cole
16 and Judge Bechhoefer nodding with regard to the
17 relevance of how the NRC staff did its job in
18 investigating that that would not be relevant.

19 JUDGE BECHHOEFER: That is correct.

20 JUDGE YOUNG: So that would lead to not
21 allowing you to call Mr. McNulty if that is all we're
22 looking at.

23 JUDGE BECHHOEFER: That's a recent policy.

24 JUDGE YOUNG: Judge Bechhoefer is just
25 saying that is also a recent policy statement of the

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1 NRC.

2 With regard to Ms. Evans as to whether she
3 may have -- there might be some exceptional
4 circumstances such that she may have direct personal
5 knowledge of material fact such that she should --
6 such that TVA should be permitted to call her as a
7 witness.

8 I'll give my impression and that may also
9 provide some elucidation on our thinking with regard
10 to attorneys as witnesses generally, and that is I
11 don't think that we want -- I don't think it's a good
12 precedent to set to get into anyone examining lawyers
13 about their legal opinions.

14 If there's a document that shows it is
15 relevant, I would probably say the document could come
16 in but I don't think it's a good practice to be
17 examining any lawyer on either side about what their
18 legal opinions are.

19 That leaves some issues to be determined
20 but, again, with Ms. Evans if you've got some piece of
21 paper that says what her legal opinion is that the NRC
22 provided to you, that may be something that we can
23 talk about.

24 Apart from that, again, this is a de novo
25 proceeding so with that and the general hesitance to

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1 ask lawyers about their legal opinions and legal
2 advice, Mr. Marquand, do you have anything you want to
3 say about that?

4 MR. MARQUAND: I do with respect to both
5 matters. First of all, so long as the staff is
6 willing to stipulate that is -- we have the document.
7 We have a written opinion that that is the legal
8 opinion that she rendered and that is the basis upon
9 which OI concluded the 1993 investigation, we can
10 accept that.

11 JUDGE YOUNG: Mr. Dambly, would you agree
12 with that?

13 MR. DAMBLY: With a couple of caveats.
14 First and foremost, whatever her legal opinion is is
15 totally irrelevant. The board has to make a decision
16 on what is protected activity and what's not. I
17 guarantee you she said this was protected activity or
18 he wouldn't be trying to get a stipulation to get that
19 in the record. It's irrelevant.

20 JUDGE YOUNG: And, Mr. Dambly, that goes
21 to the whole issue of this being a de novo proceeding.
22 I agree with you and I think we probably all agree.
23 We need to make our own determinations on these
24 things.

25 MR. DAMBLY: I don't see a need to have a

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1 stipulation that she came up with an opinion that they
2 like on one thing and didn't like on something else.
3 I just don't see the relevance of that.

4 In addition, if you were going to allow a
5 stipulation she wrote this document, then we would
6 want to add to the fact that OI did not do an
7 investigation in '93, they just accepted a document
8 from TVA's IG.

9 JUDGE YOUNG: Mr. Marquand, with Mr.
10 Dambly's wanting to add in the additional stipulated
11 fact that he just stated, could you to along with
12 that?

13 MR. MARQUAND: I think we'll just submit
14 the 1993 investigation and I will let it speak for
15 itself. With respect to --

16 JUDGE YOUNG: Back up for a second.
17 You're saying instead of submitting Ms. Evans --

18 MR. MARQUAND: Just submit the whole thing
19 which includes her legal opinion.

20 JUDGE YOUNG: And, Mr. Dambly, do you have
21 any objection to submitting the whole thing?

22 MR. DAMBLY: I may well. Again, Your
23 Honor, this is a trial de novo and to the extent that
24 somebody has factual evidence, we're not here to
25 investigate whether OI did a good job or a bad job.

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1 Whatever they -- I mean, clearly they came
2 out in '96 and said TVA is guilty. I mean, if we're
3 going to say in '93 they said they weren't and that
4 counts then in '96 we don't need this hearing because
5 this is the '96 issue and OI found they were guilty so
6 we don't have a need for the hearing.

7 MR. MARQUAND: That misses the point, Your
8 Honor. That goes to the second matter which I wanted
9 to address. We recognize this is a de novo hearing
10 and that the staff has to prove -- it is their burden
11 of proof to prove the notice of violation. But that
12 being said, they would have to prove the notice of
13 violation and they have to prove it upon the theory
14 stated in the notice of violation.

15 While we're not here to contest or try to
16 prove that OI did a bad job, the notice of violation
17 says it is based upon the OI investigation report. If
18 there are other matters that OI did not consider that
19 are relevant to show that, in fact, there is not a
20 violation, that needs to be considered.

21 Now, with respect to the 1993 complaint,
22 what we've had is that staff take one position one
23 point in time and then as soon as they are called upon
24 they are taking another position. The point is in '93
25 they didn't view anything that Fizer had done as

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1 protected activity.

2 Now we're involved in a little shuck and
3 jive trying to say that maybe he did engage in
4 protected activity. Well, I think it's relevant to
5 come in to show that they have changed their position
6 and that their positions keep changing depending on
7 what day of the week it is.

8 JUDGE YOUNG: We may need to confer in a
9 minute here with the board but let me just ask, Mr.
10 Dambly, I assume you are going to have someone from
11 the staff who will be presenting some evidence on
12 behalf of the staff Office of Investigation,
13 Enforcement Division -- Office of Enforcement. Excuse
14 me, I'm stumbling to try to get the right term here.

15 JUDGE BECHHOEFER: They mentioned at one
16 point Office of Enforcement.

17 JUDGE YOUNG: Mr. Dambly, we are correct
18 in assuming that you will be calling someone, correct?

19 MR. DAMBLY: Yes, Your Honor. We're
20 calling Jim Leahman as the Deputy Office Director for
21 the Office of Enforcement to explain how the penalty
22 was arrived at.

23 JUDGE YOUNG: You do not intend to present
24 any other evidence from NRC staff on NRC staff theory
25 of how this is protected activity, etc.?

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1 MR. DAMBLY: No, Your Honor. Those are
2 legal questions that we have addressed in the brief.
3 Again, as we pointed out in the last pre-hearing
4 conference, and contrary to Mr. Marquand's
5 representations, the NOV doesn't have some theory
6 that's been changing. The NOV just says contrary to
7 50.7 they discriminate against Mr. Fizer in part
8 because of his protected activities.

9 It's got no theories. I don't know what
10 he's talking about. He's back to his cover letters
11 and his OI reports and everything else. He's not
12 dealing with the document which is at issue which is
13 the NOV itself.

14 JUDGE YOUNG: Let me just ask you, Mr.
15 Marquand, you're not contending that Ms. Evans has
16 direct personal knowledge of material facts such that
17 an exception to the rule under Section 2.20(h)(2),
18 subsection (h)(2), would be applicable? Are you or
19 are you?

20 MR. MARQUAND: Let me look at it a second.
21 My understanding is she had knowledge based -- her
22 knowledge is based upon her review of the information
23 OI gathered. She analyzed it and concluded that he
24 had not engaged in protected activity.

25 Like I said, to avoid calling a lawyer as

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1 a witness, we will be more than happy to simply submit
2 the documents that were produced to us respecting the
3 1993 investigation.

4 JUDGE YOUNG: Am I correct in saying that
5 the investigative report is on -- the witness list --
6 pardon me.

7 MR. MARQUAND: I'm sorry. Your line broke
8 up.

9 JUDGE YOUNG: Is the investigative report
10 on your witness list?

11 JUDGE BECHHOEFER: No, on your document.

12 JUDGE YOUNG: On your document list.
13 Pardon me, document list.

14 MR. MARQUAND: It was intended to be
15 designated. I understand it's on there as well as her
16 legal opinion.

17 JUDGE YOUNG: Okay. Mr. Dambly, you have
18 not objected to the investigative report?

19 MR. DAMBLY: Well, Your Honor, we didn't
20 object to all the documents that are objectionable on
21 the list. There are lots of those documents. We just
22 figured you would handle those in the normal course of
23 the hearing. If they go to put in something that is
24 irrelevant or otherwise, we would object at that time.
25 There are a lot of documents.

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1 JUDGE YOUNG: Okay. Okay. That may be
2 the most appropriate way to deal with this. As we
3 move forward to the hearing, this may -- several of
4 these things relating to investigative reports, the
5 TVA investigative report with regard to Mr. Grover,
6 the investigative report of the NRC with regard to Mr.
7 Fizer.

8 As I said, under the rules of evidence
9 normally I would not allow those in. Whether they
10 should come in under some relaxed rules of -- relaxed
11 interpretation of the rules of evidence is something
12 that we'll have to think about. But it also may be
13 something that you all may want to talk with each
14 other about and come to some kind of agreement on that
15 type of evidence.

16 Quite frankly, I think that we can
17 probably do without either of them and would not give
18 them a whole lot of weight anyway in making our own
19 decision about the matters at issue.

20 It would certainly make the proceeding go
21 a little bit more efficiently and avoid some
22 tangential -- somewhat tangential issues with the
23 evidence on the primary issues on which will come in
24 primarily through other means. That was a long
25 sentence but do you follow what I said, Mr. Dambly and

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1 Mr. Marquand?

2 MR. DAMBLY: I think so, Your Honor.
3 Certainly with respect to the Grover IG report, the
4 staff would have no problem stipulating they did an
5 investigation and they concluded -- the IG concluded
6 that he engaged in various misconduct in listing
7 whatever they listed as the misconduct.

8 That's what OIG concluded and leave it at
9 that for purposes of showing -- I guess they are
10 trying to show he's biased because of the findings in
11 whatever year it was. You know, that says that.

12 Without getting into whether those
13 findings are true, false, indifferent, whether we have
14 to go through phone logs and everything else for
15 purposes of trying to support a claim of bias, I think
16 it's sufficient to put in the record they did an
17 investigation, they made a conclusion that he engaged
18 in misconduct. It's already in the notice of removal,
19 I think.

20 JUDGE YOUNG: Prior to the investigative
21 report on Mr. Fizer, I want to hear from Mr. Marquand,
22 too. Do you think that you could work out
23 stipulations on both of those so that we don't need to
24 get into these things that would not normally come in
25 because they are replete with hearsay in the first

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1 place?

2 MR. MARQUAND: Your Honor, you had asked
3 me to address that issue earlier and I did not want to
4 protract this case by engaging in a trial with respect
5 to Mr. Grover. I acknowledge that there may be -- I'm
6 not sure but there may be portions of the IG report
7 which are based on hearsay. But to the extent that
8 any of that would reflect on his credibility, I would
9 not even attempt to go into any of that hearsay matter
10 with respect to that.

11 The parts that do reflect on his
12 credibility are parts that nobody could ever dispute
13 which are hundreds of pages of phone logs documenting
14 literally thousands of long distance phone calls that
15 he was making on his own time -- on TVA time on his
16 own personal business a thousand miles away from --
17 with respect to a realty company and business he was
18 conducting a thousand miles away from where he was
19 supposed to be working.

20 JUDGE YOUNG: Could you work with Mr.
21 Dambly to try to work out a stipulation on that? Also
22 a stipulation on whatever you want to -- however you
23 want to characterize the investigation that was done
24 with regard to Mr. Fizer.

25 We think -- I think maybe there may be

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1 some consensus here that if you could do that, that
2 would make this hearing go a lot more efficiently.
3 Given that we would not give much, if any, weight to
4 those investigative reports anyway, it would get those
5 issues put aside and get us to the more relevant
6 issues of what we need to decide in this case.

7 MR. DAMBLY: Your Honor, I'm certainly
8 willing to try to work out a stipulation with staff.

9 MR. MARQUAND: We have no problem, Your
10 Honor, in trying to move this along.

11 JUDGE YOUNG: Great. We're going to put
12 you on mute for just a minute.

13 (Whereupon, off the record.)

14 JUDGE YOUNG: Counsel, if we can get a
15 clarification from you that might assist the board.
16 I was suggesting that you might enter into
17 stipulations in lieu of submitting these investigative
18 reports relating to TVA's on Grover and NRC's on
19 Fizer.

20 I think that we all were sort of
21 understanding that with regard to the Grover one, for
22 example, we would agree there were phone records. It
23 could be stipulated that TVA brought charges against
24 Mr. Grover based on a phone message showing a number
25 of phone calls without any further conclusions. Just

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1 basic facts that you could agree on.

2 Then with regard to the Fizer
3 investigative report, that it could be stipulated that
4 early on it was determined -- there was a view that
5 the 1991 to 1993 activities were not protected
6 activities such that we wouldn't need to -- there may
7 be some other parts to whatever stipulation you wanted
8 to make such that there would be no need to bring
9 those documents in. Are we sort of on the same wave
10 length on that? Is that something that the parties
11 can work on?

12 MR. MARQUAND: Your Honor, this is Brent
13 Marquand. I believe I would go a little further than
14 that with respect to both matters. Not terribly much
15 further but a little bit, and that is with respect to,
16 for instance, the OI's report and opinion with respect
17 to protected activity would reflect the matter that
18 the position taken by the staff initially was that
19 that protected -- that the activities from '91 and '93
20 were not, in fact, protected activities and append to
21 that the staff's written opinion on that for purposes
22 of making a record.

23 Then with respect to matters of what the
24 OIG had to say is not only TVA brought charges but
25 it's undisputed that Mr. Grover engaged in making

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1 these phone calls. He didn't dispute it when given a
2 chance to comment and provide information to TVA's
3 OIG.

4 It's undisputed that he made these calls
5 and he ripped the government off for literally
6 thousands of phone calls and was absent for more than
7 100 days. It can be well documented he was away from
8 the work place without taking leave. He engaged in
9 basically fraudulent activity with respect to his TVA
10 employer.

11 JUDGE YOUNG: You're drawing a lot of
12 conclusions that you may want to think about limiting
13 to just what phone calls were made and the numbers and
14 so forth.

15 MR. MARQUAND: I'm sure we can write it in
16 a factual presentation.

17 JUDGE YOUNG: With all that said, I guess
18 Mr. Dambly, let me ask you, given that the alternative
19 is -- an alternative that might be considered by the
20 board would be to allow in the report given the
21 relaxed rules of evidence is the staff willing to talk
22 about written stipulations that both sides would agree
23 to in lieu of putting in all those -- the complete
24 report?

25 MR. DAMBLY: Your Honor, I think I've said

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1 previously yes, that we don't have a problem. For
2 that matter, I would not have a problem if it makes
3 matters easy stipulating that Ms. Evans wrote a
4 document and putting that document in.

5 Ms. Evans is not staff. She's not even in
6 the General Counsel's Office. She's an attorney who
7 works in Region II as the regional counsel. Her
8 opinion is not the staff's opinion, it's her opinion
9 but we can put her opinion in. It's not what the
10 staff's opinion is or was.

11 JUDGE YOUNG: It sounds like you've got
12 the makings of working out stipulations on both of
13 those things. We encourage you to do that. If we
14 need to set another time to talk, I'm not sure whether
15 we will be able to, but we encourage you to do that so
16 that can be off everybody's plate in terms of these OI
17 reports. Given what Mr. Dambly just said about Ms.
18 Evans' written statement, then that takes care of the
19 issue of her as a witness, I think. Any disagreement
20 with that?

21 MR. MARQUAND: I think that's a reasonable
22 approach, Your Honor.

23 JUDGE YOUNG: Thanks. So that takes care
24 of Mr. McNulty and Ms. Evans. They are out as
25 witnesses.

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1 JUDGE BECHHOEFER: Well, we can deal with
2 any agreements or lack of them at the outset of the
3 hearing right at the beginning.

4 JUDGE YOUNG: We can deal with any
5 remaining disagreements at the hearing obviously.
6 Hold on one second. We are going to confer a moment.

7 (Whereupon, off the record.)

8 JUDGE YOUNG: We're back. Are there any
9 other issues besides -- I think we have taken care of
10 the OI report on Grover. You are going to try to make
11 a stipulation on that. So that leaves us with the
12 issue of Mr. Marquand's and Mr. Bigliucchi's
13 testimony. Is there anything else before talking
14 about that that we need to address?

15 MR. MARQUAND: I wanted to address at some
16 point, and I don't care about when, this is a
17 housekeeping matter. We would like to make -- these
18 are the exhibits for each member of the board and the
19 witnesses and staff. We want to inquire about how
20 many sets are needed or how many record copies or
21 whatever so that we'll know how many to prepare.

22 Ms. Euchner have talked about how to go
23 about doing exhibits and what we have proposed to do
24 was provide a complete set of all the proposed
25 exhibits and we assume the court reporter or the

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1 courtroom deputy or someone would keep track of what
2 was admitted into evidence so that when the board
3 reviews the record, it will know which of the exhibits
4 have been admitted into evidence among those that have
5 been provided.

6 JUDGE YOUNG: Let me just tell you how I
7 have done this in the past and this is something that
8 we can consider that has helped in fairly complex
9 cases where there are a lot of exhibits. That is, if
10 you don't prenumber them and we admit them as we go,
11 we just number them all consecutively. The ones that
12 we do not admit, if anyone wants to make an offer of
13 proof or we mark those as rejected exhibits using
14 letters instead of numbers, something to that effect.

15 MR. MARQUAND: Your Honor, what we've done
16 sometimes in the past that I think might expedite it
17 is to give each of the board members a notebooks, or
18 notebooks, of the exhibits. Rather than having to
19 deal out copies of exhibits during the hearing, we can
20 simply refer to a number and everybody can turn to it.

21 Then at that point, as you said, we could
22 have it identified and admitted. At the conclusion of
23 the hearing we can take the books and clean them up
24 and remove anything that hasn't been admitted. Just
25 for expediting the hearing, we prenumber everything

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1 and give them to everybody so everybody can flip to it
2 at the same time.

3 JUDGE BECHHOEFER: I usually like to have
4 a record of what happens to all of the documents
5 proposed. The documents that are not accepted into
6 evidence are supposed to travel with the record for
7 purposes of appeals and that kind of thing. I think
8 they all ought to have a number.

9 JUDGE YOUNG: You said that you would have
10 them numbered, right, Mr. Marquand?

11 MR. MARQUAND: I understand what Judge
12 Bechhoefer is saying but just because we've got them
13 on a list, you've asked us to identify anything we
14 might possibly use. You know, there are things that
15 we may not even offer, wouldn't propose to offer
16 unless some issue came up. I'm not sure that those
17 would need to travel with the record.

18 JUDGE BECHHOEFER: They don't but we could
19 indicate that documents with certain numbers were not
20 offered. They don't drop out of the numbering system
21 but they aren't part of the record.

22 MR. MARQUAND: That's fine. We can leave
23 them in the books. My question then is how many sets
24 of exhibits? We need to have everybody speak up.
25 Obviously the board members and staff counsel and

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1 witnesses. I'm not familiar with having record copies
2 there may need to be or anything like that.

3 MR. SLATER: Your Honor, this is John
4 Slater. I believe according to the board rule, for
5 record purposes there should be an original and two
6 copies for the record. What we are trying to figure
7 out is whether or not we have to have the original and
8 two copies separate from notebooks for each of the
9 three judges.

10 JUDGE YOUNG: You know that better than I
11 do, Judge Bechhoefer.

12 JUDGE BECHHOEFER: Well, the original, of
13 course. The reporter needs to keep one and then he'll
14 certify the transcript and all the documents up to the
15 Secretary. The originals get filed with the Office of
16 the Secretary.

17 JUDGE YOUNG: What are the two copies for
18 that he was referring to?

19 JUDGE BECHHOEFER: As specified by the
20 rules.

21 JUDGE YOUNG: So he's asking where would
22 those two copies go? Would they be two of the ones
23 the board uses?

24 JUDGE BECHHOEFER: No.

25 JUDGE YOUNG: In other words, you would

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1 need to provide at least one.

2 JUDGE BECHHOEFER: At least one copy
3 should be for the record to the Secretary.

4 JUDGE YOUNG: What he's asking is the
5 other two copies that are required by the rule.

6 JUDGE BECHHOEFER: That's one of them.
7 That's one of them. The other was probably -- it used
8 to be for the appeal board but they don't have an
9 appeal board.

10 JUDGE YOUNG: There are three copies that
11 need to be provided for the official record.

12 JUDGE BECHHOEFER: Well, one for each of
13 us in any event plus one for the party.

14 JUDGE YOUNG: Three record copies.

15 MR. REPKA: Judge, this is Dave Repka.

16 JUDGE YOUNG: Excuse me. Excuse me.

17 MR. REPKA: This is Dave Repka. I was
18 just going to offer in my experience we've given the
19 extra copies to the court reporter to keep with the
20 record. The court reporter would get the original and
21 two copies.

22 JUDGE YOUNG: That's what I was thinking.
23 I think the answer would be yes, the three copies for
24 the court reporter. Then let me just ask a question.
25 We've got over a foot high of staff exhibits in

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1 support of its opposition to the motion for summary
2 judgement.

3 Are you talking about giving each of us a
4 foot and a half high stack of documents? If not, I
5 would prefer to have each of us have our own notebook
6 of exhibits. If we are talking about a huge amount,
7 then that becomes somewhat of a different question.

8 MR. MARQUAND: Your Honor, I think it's a
9 huge amount.

10 MR. DAMBLY: I would have to agree it's
11 going to be a huge amount. I don't know why that
12 would be why you wouldn't want your own copy for the
13 hearing but, if you don't.

14 JUDGE YOUNG: It may be that if you can
15 give us each a copy and also provide a mailable box
16 that we can send it back to you.

17 MR. MARQUAND: Your Honor, let me suggest
18 when we've done this, and I think this is the way we
19 would do it, if we could get each of you a set in the
20 notebooks with defined number of exhibit numbers 1
21 through 20 and 21 through 72 and then have each of you
22 get a banker's box with your --

23 JUDGE YOUNG: We could e-mail it back.

24 JUDGE BECHHOEFER: It could be e-mailed.

25 JUDGE YOUNG: Okay. That sounds good. As

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1 long as we can mail them back so that we don't have to
2 hand carry them back.

3 MR. MARQUAND: We need three record
4 copies, three sets, one for each one of the judges.
5 We need to make a set for the staff and one for the
6 witness so there can be a set of these exhibits on the
7 witness stand and the witness can be directed to turn
8 to certain ones. Then obviously have a main one in
9 house.

10 JUDGE YOUNG: Right. And you're going to
11 do that together so that there is one set that both of
12 you have agreed on as these are the witnesses -- I'm
13 sorry -- these are the documents that may be offered
14 as exhibits. Am I assuming correctly?

15 MR. MARQUAND: You are assuming more than
16 we contemplated. We have talked with counsel for
17 staff and staff has identified the documents between
18 two lists that overlap. We were going to propose --
19 it sounds to me like how we'll do it is we at TVA have
20 a lot of documents, staff's got a lot of documents,
21 and then there's lots that overlap.

22 I think we can provide at least maybe one
23 set of joint ones so that we don't have two sets of
24 numbers for the 60 documents. I think each party will
25 have to be responsible for their own.

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1 MR. DAMBLY: That was our feeling, Your
2 Honor, that we would get together with TVA and come
3 out with probably 60 or more exhibits that both of us
4 had listed and we could do those as Joint Exhibits 1
5 through whatever in one volume or two volumes.

6 I don't know how many volumes it will take
7 for those documents. Then each party could do their
8 own Staff Exhibit 1 through X and TVA Exhibit 1
9 through X.

10 JUDGE BECHHOEFER: That sounds reasonable
11 to me, at least.

12 JUDGE YOUNG: Very reasonable. As long as
13 we don't get duplicate sets it sounds very reasonable
14 to us. I think we are all understood on that.

15 Any other things before we get to the
16 issue of the attorneys?

17 MR. MARQUAND: Not for the staff, Your
18 Honor.

19 JUDGE YOUNG: I think that it would be
20 helpful to us maybe, Mr. Marquand, if you could reply,
21 or Mr. Repka can reply to the staff with regard to Mr.
22 Marquand and Mr. Bigliucchi. Then to what ever degree
23 necessary we think it would be helpful to hear what
24 questions would be asked and what the responses would
25 be so that everybody can understand where we are on

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1 this.

2 It seems to us that there is not a meeting
3 of the minds between the parties on what that
4 testimony would actually be. This might be a very
5 efficient way of addressing early on.

6 MR. DAMBLY: Your Honor, this is Dennis
7 Dambly for the staff. Maybe to speed things up, Mr.
8 Bigliucchi was being called because during a break in
9 one of the depositions he indicated that he recalled,
10 or thought he had drafted a response to the Sasser
11 letter.

12 He has now put in an affidavit that he
13 didn't say that and he didn't do that and they put in
14 an affidavit from Donald Hickman. The staff will be
15 more than happy to switch Mr. Hickman for Mr.
16 Bigliucchi on the witness list.

17 MR. MARQUAND: That's fine.

18 JUDGE YOUNG: Pardon?

19 MR. MARQUAND: I said that's fine with us.

20 JUDGE YOUNG: Okay. Very good. Then that
21 takes care of Mr. Bigliucchi. We thank you.

22 MR. MARQUAND: Thank you for your
23 participation, Ed.

24 MR. BIGLIUCCHI: I appreciate your
25 inviting me.

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1 JUDGE YOUNG: Hold on one second. Judge
2 Bechhoefer has a question.

3 JUDGE BECHHOEFER: Is Mr. Hickman a
4 lawyer?

5 MR. MARQUAND: Well, Mr. Hickman is ex-FBI
6 agent who is now the Acting Inspector General at TVA.
7 He's not a lawyer by trade.

8 JUDGE YOUNG: They had an agreement that
9 he would be called instead of Mr. Bigliucchi.

10 JUDGE BECHHOEFER: That sounds fine with
11 us.

12 JUDGE YOUNG: Again, thank you, Mr.
13 Bigliucchi. You are free to go and that takes care of
14 Mr. Bigliucchi.

15 MR. BIGLIUCCHI: Thank you.

16 JUDGE YOUNG: Moving on to Mr. Marquand.
17 Is there any further clarity on what Mr. Marquand's
18 testimony would be since the staff filed its response
19 and can we sort of get out on the table the remaining
20 disputes between you on the issue of what Mr. Marquand
21 would say if called as a witness?

22 MR. MARQUAND: First of all, the two areas
23 that I understand as to which I had involvement and
24 which there may have been some waiver. In the process
25 of doing reorganization in 1996 when Mr. Fizer

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1 threatened to file a Department of Labor complaint
2 after he learned that they were -- actually knew that
3 they were going to post the job -- staff went to the
4 Labor Relations Officer --

5 JUDGE YOUNG: We missed a word there.

6 MR. MARQUAND: Human Resources personnel,
7 who Mr. Fizer confronted, went to the Labor Relations
8 Officer and Nuclear was responsible for coordinating
9 Department of Labor cases and had some historical
10 knowledge. They went to that individual -- Mr. Fizer
11 was correct that --

12 JUDGE YOUNG: Mr. Marquand, for some
13 reason we're losing words. I don't know whether there
14 is paper shuffling but we want to make sure we get
15 this so if you could back up a little bit there and
16 say the last thing you said over again.

17 MR. MARQUAND: Involved in writing the job
18 description for the new job and when he --

19 JUDGE YOUNG: Excuse me. I'm sorry.
20 We're still missing. You said "involved in writing."
21 We didn't catch the subject of that sentence.

22 MR. MARQUAND: Mr. Fizer was involved in
23 writing the position description for the new job. At
24 the point in time when he knew that the job was about
25 to be posted, he went to the Human Resources Officer

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1 and threatened to file the Department of Labor
2 complaint if the job was posted for competition. He
3 told them he felt it was his job by right of his 1993
4 settlement agreement.

5 The Human Resource Officer then went to
6 the Labor Relations Officer. The Labor Relations
7 Officer was responsible for handling and coordinating
8 Department of Labor complaints.

9 The Human Resource Officer asked the Labor
10 Relations Officer whether or not based upon the '93
11 settlement agreement Mr. Fizer had a right to the job,
12 not whether the job by virtue of OPM regulations
13 should be posted or not or whether Mr. Fizer had a
14 right to transfer under OPM regulations, but whether
15 he had a right under the settlement agreement to the
16 new job.

17 The Labor Relations Officer, Cathy Welch,
18 called me because I handled Department of Labor cases
19 for some years, and asked me for the same legal advice
20 and legal interpretation.

21 I looked at it very quickly, the 1993
22 settlement agreement, and said he had a right to be
23 placed in a certain job. It doesn't guarantee him
24 that job for life. It doesn't guarantee him any new
25 jobs. You should not change your normal procedure

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1 based on his allegations that he had a right under the
2 '93 agreement because it didn't give him that right.

3 As I understood it, they were in the
4 process of posting that job and I said, "You should
5 continue on in your processes and follow your normal
6 process." That was the extent of my advice to Cathy
7 Welch, the Labor Relations Officer, who turned around
8 and provided that advice to the Human Resource
9 Officer. That is the extent of my advice.

10 Ms. Welch gave a statement to the
11 Inspector General in the investigation of this and a
12 copy of that statement was provided to the staff.
13 Also at the predecision enforcement conference I said
14 the same thing. It's a matter of record in both
15 situations. The same thing.

16 The other matter that, as I understand it,
17 is involved is during the investigation by the
18 Department of Labor, they spoke to Wilson MacArthur.
19 Wilson MacArthur has been very ill since 1993. He's
20 a very frail individual. He was interviewed without
21 counsel present.

22 During that interview he indicated that he
23 had at one point in time been informed that Mr. Fizer
24 had surreptitiously tape recorded various
25 conversations. Mr. MacArthur was asked who told him

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1 that. He said he thought I had done that. He said he
2 thought I had indicated to him that based on that
3 knowledge he should be sensitive to the possibility he
4 was being tape recorded in the future. That's the
5 extent.

6 Mr. MacArthur at other times has said that
7 he thinks he has seen a copy of the transcript or that
8 he has listened to the tapes. I'm not sure that I
9 know what he's talking about when he says he's seen
10 copies of the transcripts because I haven't seen
11 copies of transcripts myself. He may be confusing
12 that with another matter in another IG investigation
13 involving Mr. Jocher.

14 The IG tape recorded their interviews and
15 that was transcribed and those were provided to him
16 prior to him testifying in the Jocher case. He may
17 simply have been confused on that. But, in any event,
18 he waived whatever privilege there was with respect to
19 the advise I gave him about being sensitive to the
20 fact that he was being tape recorded.

21 As far as I know, that's the only -- and
22 another individual by the name of Ben Easley who is
23 also a Human Resource Officer said that he was told
24 the same thing and he was also witness to the Jocher
25 case. To my knowledge, that's the extent of any

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1 divulgement by anyone of any information I provided
2 them about tape recordings that Mr. Fizer may have
3 made.

4 JUDGE YOUNG: Mr. Dambly, given what you
5 just heard from Mr. Marquand, what is your argument at
6 this point and is there anything further that you
7 would want to ask Mr. Marquand, what would it be?

8 MR. DAMBLY: Let me make two points, Your
9 Honor. First, as to the advice on the '94 settlement
10 agreement, we'll take Ms. Welch and her statement and
11 we can put her on the witness list and not worry about
12 Mr. Marquand on that.

13 As to the tape recordings, we're talking
14 about the same tape recordings that you dealt with
15 earlier that have been enhanced and whatever. Those
16 were given in confidence by Mr. Fizer to the TVA's IG
17 and he was told they wouldn't release those without
18 his knowledge, without his permission.

19 Then they ended up in Mr. Marquand's hands
20 without his permission. They were told he would just
21 send the letters and then would give them to Office of
22 the General Counsel. Mr. Marquand proceeded to tell
23 people and maybe show people and he has refused to
24 tell us who he told which I don't think is privilege
25 in any way, shape, or form.

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1 He keeps talking about divulgement but
2 there is no privilege for he got information and
3 passed it on to people. He's not the client, he's the
4 attorney. If he took information and passed it to
5 people and said, "Mr. Fizer's taping you on the DOL.
6 Watch out for him," that may well be a violation in
7 and of itself and we are entitled to inquire.

8 If he would like to tell us everybody that
9 he gave it to and what he told them and how he got it
10 in the first place, none of which is privileged, then
11 that takes care of the issue. We asked for it in
12 discovery got stonewalled with, "Oh, it's attorney
13 work product," and God knows what all else. I don't
14 know how it could be.

15 MR. MARQUAND: I disagree. The tapes were
16 given by Mr. Fizer to the Inspector General and the
17 Inspector General did not grant him any
18 confidentiality. They did tell him that they wouldn't
19 divulge it further without telling him, which they did
20 do.

21 They were provided to us in context of --
22 we were allowed to look at them in the context of
23 preparing for the DOL trial in the Bill Jocher case
24 which was at that time related, as you are aware,
25 because of the involvement of Jocher and Fizer were

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1 both in Chemistry and Jocher and Fizer are both at
2 Sequoyah. We have already referenced the letter that
3 both of them wrote to Senator Sasser.

4 JUDGE YOUNG: Mr. Marquand, when you say
5 they were provided to us, do you mean the Office of
6 General Counsel?

7 MR. MARQUAND: Yes. We saw them as part
8 of our preparation for the Jocher case. What we did
9 with them and how we -- what we did with them to
10 prepare for the Jocher case was certainly work
11 product. The fact that I had a conversation with Dr.
12 MacArthur and Mr. Easley in the context of preparing
13 for trial in the Jocher case is work product and would
14 not be subject to disclosure.

15 The fact that Dr. MacArthur and Ben Easley
16 without the advice of counsel disclose that obviously
17 adds to them. That is the extent of any disclosure
18 that has been made. That work product doctrine still
19 protects whatever we've done with respect to getting
20 ready for trial in that case.

21 As I said, I don't know of any transcripts
22 other than the "transcript" that Fizer made. I don't
23 know where we're going with this. I can't see that
24 telling somebody to be sensitive to the fact that they
25 may be being tape recorded surreptitiously constitutes

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1 any sort of misconduct by anyone.

2 JUDGE YOUNG: Let me just ask you, I
3 thought I understood you to say a minute ago and also
4 just now that the disclosure to Mr. MacArthur and Mr.
5 Easley were the only disclosures you made of those
6 tapes. Did I understand that right?

7 MR. MARQUAND: No. Those are the only
8 disclosures that have been divulged. I can think of
9 two other managers who are not involved in this case
10 who I -- maybe just one. One for certain that I
11 informed to be sensitive to the fact that he might be
12 tape recorded. That was in the context of preparation
13 for the Jocher trial.

14 JUDGE YOUNG: Mr. Dambly, does that
15 satisfy what you wanted to know?

16 MR. DAMBLY: No, it doesn't, Your Honor.
17 Again, there's no work product privilege for "I got
18 this stuff from the IG who got it from Mr. Fizer and
19 I'm warning you watch out for Gary Fizer." I would
20 like to know who he told because as you are well
21 aware, one of the big issues here is we keep hearing
22 nobody there knows about anything that Mr. Fizer did.
23 The three --

24 JUDGE YOUNG: Hold on just a second. Let
25 me be more direct. Maybe Mr. Marquand can correct me

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1 if I'm wrong but what I just heard Mr. Marquand say
2 that in addition to Mr. Easley and Mr. MacArthur there
3 may have been one other manager that he said to be
4 sensitive to the fact that maybe he is being taped
5 because there have been tapes.

6 What I'm asking you, Mr Dambly, is what
7 more would you want to know from Mr. Marquand? Let's
8 get it out on the table what you want to know and
9 what, if anything, Mr. Marquand is saying he won't
10 tell you because I'm not clear on that at this point.

11 MR. DAMBLY: What I'm interested in is who
12 the other managers he talked to were and what he told
13 them.

14 MR. MARQUAND: What I told them had to do
15 with the context of getting ready for the Jocher
16 trial. The fact that I told somebody to be sensitive
17 about the fact they were being taped was simply
18 incidental to the fact of getting ready for trial.

19 JUDGE YOUNG: And so, Mr. Marquand, you're
20 not telling who you said that to and you're saying it
21 is work product in your preparation for the Jocher
22 trial. J-O-C-H-E-R, for the court reporter, I think
23 is how that's spelled. Correct?

24 MR. MARQUAND: That's correct.

25 JUDGE YOUNG: And, Mr. Dambly, please

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1 clarify for us what it is that you want from Mr.
2 Marquand that cannot be gotten anywhere else and that
3 would be -- and what is your argument on why apart
4 from what Mr. Marquand had told us we should allow you
5 to question him at the hearing about that?

6 MR. DAMBLY: Again, Your Honor, Mr.
7 Marquand -- what I want from Mr. Marquand is the names
8 of the people he told and in the context he told them.
9 This is not work product. Work product use mental
10 impressions. "Mr. Fizer is tape recording. You watch
11 yourself," is not his mental impressions.

12 It's based on he was given documents or
13 tapes from the IG's office and he went out and spread
14 the word to people. We want to know who those people
15 were because we're interested in who knows about Mr.
16 Fizer's protected activity which they keep saying
17 nobody knew.

18 MR. MARQUAND: You can't dissect the work
19 product like that. If I sit down with a witness and
20 work with them for two hours on a matter, you can't
21 dissect that conversation into little bits and pieces
22 and snippets and say this is protected and this isn't.

23 MR. DAMBLY: Witness preparation is not
24 even work product. It's his mental impressions of
25 what his theories are and everything else. It's not

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1 what he told people. It's not privileged in any way,
2 shape, or form.

3 JUDGE YOUNG: Mr. Marquand, let's see how
4 firm you are here on your -- you're saying that there
5 may have been one other manager. Are you objecting to
6 giving the name of the manager based on work product?
7 Is that what you're doing or have you thought that
8 through?

9 MR. MARQUAND: I couldn't swear that I
10 even told this individual. He's the only person I can
11 think that I may have told it to. I did work with
12 that individual in the context of the Jocher case but
13 I can't imagine who else I may have even had reason to
14 discuss it with.

15 JUDGE YOUNG: But are you objecting to
16 telling Mr. Dambly who that person was?

17 MR. MARQUAND: I would be willing to
18 disclose that if that put an end to it and the board
19 acknowledges that was the end of it. Aside from that,
20 I don't see any reason to waive whatever privilege or
21 protection we have.

22 JUDGE YOUNG: Mr. Dambly, what --

23 MR. DAMBLY: Your Honor, I'll make it
24 easy. If he tells us who he talked to, or thinks he
25 talked to and divulged that Mr. Fizer was taping, that

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1 is sufficient and we don't need to call him. We may
2 need to call that person to see if that person then
3 told other people but that's a different question. As
4 far as Mr. Marquand, just tell us who you talked to.

5 JUDGE YOUNG: If that would resolve this
6 issue, I think that would be good because -- and,
7 again, I'm speaking for myself here but I think there
8 is a very strong policy against allowing counsel to be
9 called unless there are the exceptional circumstances
10 that would make the lawyer a witness who could give
11 testimony that was prejudicial against the client and
12 then necessarily, I think, gets us into these ethical
13 issues. If this can be resolved by just giving that
14 name, I think that would be a very good course of
15 action.

16 JUDGE BECHHOEFER: I would also like --
17 this is Judge Bechhoefer. Work product is not an
18 absolute privilege. Information which may be covered
19 by work product may be revealed and that is the only
20 way to get the information.

21 I think it is unlike the lawyer/client
22 privilege which is much more absolute. I know there
23 are specific holdings to that effect, NRC holdings.
24 Mr. Marquand, would that -- if you are going to tell
25 us -- tell the staff, I should say.

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1 MR. MARQUAND: As I said, if Mr. Dambly is
2 willing to stipulate that puts an end to this issue
3 and he is then free to inquire of that individual what
4 he knew or whether he further disseminated that
5 information, that's fine. Like I said, I don't know
6 that I told that individual. It's been seven years
7 -- no, six years, but that is the only individual that
8 there was any reason to discuss the matter with.

9 JUDGE YOUNG: Mr. Dambly, that will close
10 the issue of calling Mr. Marquand and the witness once
11 and for all is what I understood you to say. Correct?

12 MR. DAMBLY: Yes, Your Honor.

13 JUDGE BECHHOEFER: Let me inquire one
14 thing first. Would TVA have any objection if the
15 staff were to add to its witness list those particular
16 individuals?

17 MR. MARQUAND: I would not object.

18 JUDGE BECHHOEFER: Thank you. I just
19 wanted to clarify that.

20 JUDGE YOUNG: You want to go ahead and say
21 it on the record, you can, or you can do it with the
22 two of you.

23 MR. MARQUAND: Mr. Fizer had tape recorded
24 the gentleman by the name of Rob Beacon who was the
25 plant manager at Sequoyah and I was aware of that and

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1 Mr. Beacon was a witness in the Jocher case. I
2 believe that we discussed -- we may have discussed, I
3 just don't remember, the fact that Fizer tape recorded
4 him.

5 There is another individual. I don't
6 remember telling this individual and he may have
7 knowledge of it but I don't know how he has knowledge
8 of it. That is Charles Canton. You are aware of him
9 as well. I don't know if he was a witness in the
10 Jocher case or not. He may have been.

11 JUDGE YOUNG: Okay. Are there any
12 remaining issues then relating to attorneys as
13 witnesses?

14 MR. DAMBLY: Not that I am aware of, Your
15 Honor.

16 JUDGE YOUNG: Very good. I guess the only
17 other thing that strikes me that the board had talked
18 about a little bit, and that is --

19 JUDGE BECHHOEFER: Wait a minute. We got
20 two but he said before. Didn't he?

21 JUDGE YOUNG: Pardon? Four?

22 JUDGE BECHHOEFER: I thought he said there
23 may have been four people.

24 JUDGE YOUNG: He's already given the other
25 two, I think.

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1 MR. MARQUAND: MacArthur and Easley are
2 the two that counsel's aware of and they disclosed it
3 in their depositions and statements. I mentioned that
4 I may have discussed it with Beacon. Charles Canton
5 may know about it but I'm not certain how he knows.

6 JUDGE BECHHOEFER: Okay. I knew you had
7 said four and I wanted to make sure we had them.

8 JUDGE YOUNG: I think there is nothing
9 that remains on the issue of attorneys as witnesses.
10 Correct?

11 MR. DAMBLY: Correct.

12 JUDGE YOUNG: All right. I'm assuming
13 from no one raising an objection that everyone agrees
14 with that.

15 The only other thing that I can think of,
16 and Judge Bechhoefer or Judge Cole may have other
17 things, but the only other thing that I can think of
18 that we wanted to look at is whether any of the
19 witnesses on either party's list would be cumulative
20 because, if so, we would encourage not calling
21 witnesses who would merely provide similar testimony.

22 If, in the alternative, you wanted to
23 stipulate that X, Y, Z witnesses would testify to the
24 same thing, that would certainly make for a more
25 efficient hearing that would take less time. That, I

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1 guess, would also apply to any evidence but primarily
2 in terms of calling witnesses.

3 If talking about that in particular today
4 would be helpful in getting us to that point, then we
5 have a little bit more time that we could spend in
6 seeing whether there are any witnesses that would fall
7 into that category.

8 JUDGE COLE: This is Judge Cole. I merely
9 note that on the TVA witness list at least 15 are
10 listed as testifying about the 1996 reorganization.
11 I don't know whether we need that many witnesses on
12 that one matter, although it is an important matter
13 but it seems to me it would be overkill.

14 MR. MARQUAND: Your Honor, I agree. I
15 have listed them in the event that they might be
16 necessary. Some of them if they testified would be
17 one and off very quickly. Some of them at this point
18 I couldn't tell you that we absolutely needed them yet
19 or not depending on how the case developed. I didn't
20 want to be put in a position of not listing somebody
21 and having somebody say we didn't list them if the
22 issue came to the fore.

23 JUDGE YOUNG: Both parties will be aware
24 and attuned to whether their witnesses are cumulative
25 and try to avoid that as we go. Obviously that may

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1 not come out until we get to the witness.

2 We may during the course of the hearing
3 ask whether particular testimony is cumulative and
4 encourage you to move on and either side may raise
5 objections based on that in the interest of a more
6 efficient hearing without obviously cutting off either
7 side's right to present new evidence.

8 JUDGE BECHHOEFER: I wanted to inquire
9 whether either party has sent us copies of the
10 subpoenas they wish us to issue. As far as I can see,
11 we haven't received any but maybe --

12 MS. EUCHNER: Your Honor, this is Jennifer
13 Euchner for the staff. Our subpoenas were attached to
14 the witness list. They were attached right behind it.

15 MR. SLATER: This is John Slater. We also
16 sent by messenger I think three or four subpoenas
17 directly to you.

18 JUDGE BECHHOEFER: I'll have to check.
19 I've been away for the last four or five days. Oh,
20 okay. Judge Cole showed me.

21 JUDGE YOUNG: You want to go through and
22 make sure we have all of them?

23 JUDGE COLE: The subpoenas I have I assume
24 that's from TVA. I have one to Ben Easley, Carolyn
25 Evans, Gary Fizer, Ronald Grover, Sam Harvey the III,

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1 William J. McNulty, Tom Peterson, Jack L. Wilson.

2 MR. MARQUAND: I think we've already dealt
3 with Evans and McNulty.

4 JUDGE YOUNG: All those except Evans and
5 McNulty you want to be issued. And were there any
6 others that were not named?

7 MR. MARQUAND: That's all that we have,
8 Your Honor. We may not call all those but we simply
9 need them in the eventuality that their testimony does
10 become relevant.

11 JUDGE YOUNG: Okay. And then for the
12 staff, which witnesses do you want?

13 MS. EUCHNER: Ben Easley and Ron Grover.
14 I also had one for Dr. MacArthur.

15 JUDGE YOUNG: So those three?

16 MS. EUCHNER: Yes. Those are the three
17 witnesses we asked to subpoena. Let me know if you
18 don't have them because I understand from Mr. Marquand
19 that Dr. MacArthur will be on the road sometime soon
20 and I want to make sure that he receives his subpoena
21 prior to his travel dates.

22 JUDGE YOUNG: Mr. Marquand, have you
23 talked to Dr. MacArthur and let him know that he will
24 be needed for the hearing?

25 MR. MARQUAND: As I said, he has not been

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1 well but he's on a mission in Salt Lake City and he is
2 supposed to be coming back the second week of the
3 trial. I'll work with staff on his schedule.

4 JUDGE YOUNG: Please do work with each
5 other to try to accommodate all the needs of all the
6 parties. Is there any witnesses that have special
7 circumstances such that you can work by agreement to
8 call them at particular times that would work for
9 them? I think the board is willing to make those
10 kinds of accommodations to move us along.

11 Are there any other matters that we need
12 to address today?

13 MR. DAMBLY: I don't think so, Your Honor.

14 MR. MARQUAND: No, thank you, Your Honor.

15 JUDGE YOUNG: Court reporter, we probably
16 need to talk to you about how soon we can get the
17 transcript on this.

18 JUDGE BECHHOEFER: Three days.

19 JUDGE YOUNG: Three days? Okay. Is that
20 what you understood?

21 COURT REPORTER: I am actually not in that
22 department here. I don't handle when things are due.

23 JUDGE BECHHOEFER: I know we had specified
24 three days.

25 JUDGE YOUNG: Okay. Well, as long as we

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1 get it in three days that would give us enough time to
2 incorporate all our verbal rulings.

3 JUDGE BECHHOEFER: Three business days but
4 that should be by Friday.

5 JUDGE YOUNG: Does anyone see any need for
6 us to get together again? If not, we will see you on
7 Tuesday, April 23 at 9:00 a.m.

8 JUDGE BECHHOEFER: Well, 9:30 is when the
9 hearing will start but we will be there earlier to
10 help set things up and make sure everything is
11 appropriate.

12 JUDGE YOUNG: To we want to give a --
13 well, we're traveling on the 22nd. TVA's emergency
14 motion for extension of time, I think Mr. Dambly
15 indicated that he didn't have any objection to that.
16 Did I recall that correctly?

17 MR. DAMBLY: Yes, Your Honor. I got you
18 there? Did I lose you?

19 JUDGE YOUNG: No. We heard you.

20 JUDGE BECHHOEFER: I just wondered if a
21 response was needed. We'll grant it after the fact.

22 JUDGE YOUNG: If you do need anything from
23 us, I'm going to be out of the office this Friday and
24 next Friday. We'll be traveling on the 22nd. We'll
25 be in, I think, maybe that morning. Maybe not. We

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1 may be going straight.

2 In any event, if you need to contact us,
3 keep those restrictions in mind because anything
4 after, I guess, the 18th at a reasonable time would
5 have to wait until we see each other the morning of
6 the 23rd.

7 JUDGE BECHHOEFER: I won't be here this
8 Friday but I will be here the following Friday.

9 JUDGE YOUNG: Anything else?

10 MR. DAMBLY: No, Your Honor. Thank you.

11 JUDGE YOUNG: Thank you.

12 (Whereupon, at 11:35 a.m. the hearing was
13 adjourned.)

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CERTIFICATE

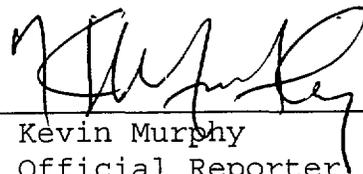
This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:

Name of Proceeding: Tennessee Valley Authority
Pre-Hearing Conference

Docket Number: 50-390-CivP;
ALSBP No. 01-791-01CivP

Location: Teleconference

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.



Kevin Murphy
Official Reporter
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