

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of

TENNESSEE VALLEY AUTHORITY

(Watts Bar Nuclear Plant, Unit 1;
Sequoyah Nuclear Plant, Units 1 & 2;
Browns Ferry Nuclear Plant, Units 1, 2 & 3)Docket Nos. 50-390-CivP; 50-327 CivP;
50-328-CivP; 50-259-CivP;
50-260-CivP; 50-296-CivP

ASLBP No. 01-791-01-CivP

EA 99-234

April 17, 2002

FIFTH PREHEARING CONFERENCE ORDER
(Confirming Matters Addressed at April 9, 2002, Telephone Conference)

On April 9, 2002, the Atomic Safety and Licensing Board conducted a telephone prehearing status conference (Tr. 199-261). (The conference had been scheduled during the February 5, 2002 conference, see Fourth Prehearing Conference Order, dated February 13, 2002, at 3). Participating, in addition to the three Licensing Board Administrative Judges, were Brent Marquand, Esq., John Slater, Esq., Edward Vigliucci, Esq. and David Repka, Esq. Counsel for Tennessee Valley Authority (TVA), Licensee; and NRC Staff Counsel Dennis C. Dambly, Esq. and Jennifer Euchner, Esq., accompanied by Nicholas Hilton, of NRC's Office of Enforcement (OE). The following matters were addressed at this conference:

1. The Board granted the March 1, 2002 Motion of the Nuclear Energy Institute (NEI) for Leave to File a Brief *Amicus Curiae*, to which no party objected, and will take the brief into account in making its decision in the case. Tr. 203.

2. The Board ruled on two motions *in limine* filed by the NRC Staff on April 4, 2002, to exclude the testimony and summary of analyses of Carey L. Peters, and to exclude certain

documents related to Ronald Grover. The Board denied the motions, finding TVA's argument in opposition to both motions (see TVA's Responses In Opposition to NRC Staff Motion *In Limine* to Exclude the Testimony and Summary of Analyses of Cary L. Peters, and TVA's Response in Opposition to Motion *In Limine* to Exclude Documents Related to Ronald Grover [TVA Grover Response], both filed on April 8, 2002) to be persuasive, with the following qualifications:

(A) Any objections the Staff has to Mr. Peters' testimony would go to the weight the Board should accord his testimony, and the Staff may, through cross-examination of Mr. Peters, bring out any weaknesses in his statistical analyses. Tr. 203. Any questions regarding Mr. Peters' qualifications as an expert witness may also be raised during the hearing, through appropriate means including *voir dire* examination.

(B) With the exception of the TVA Office of Inspector General (OIG) report, all documents relating to Mr. Grover that the Staff's motion addressed may be presented at the evidentiary hearing, in that the Board is persuaded by TVA's argument in opposition to the Staff's motion that these documents would relate to issues of bias and credibility. See TVA Grover Response. The parties agreed, with regard to the OIG report, to enter into stipulations of fact with regard to the undisputed facts underlying the OIG report, in lieu of introducing the report itself. Tr. 228-30.

3. With regard to the NRC OI report relating to Mr. Fizer's complaint against TVA, the board noted the *de novo* nature of this proceeding, in which the action of the NRC Staff is not at issue, and the parties agreed to enter into stipulations of fact with regard to the NRC OI report regarding Mr. Fizer, and also agreed that a document written by NRC Regional Counsel Evans would be admitted by stipulation, and that the previously sought testimony of Mr. McNulty would no longer be needed. Tr. 216-30.

4. Staff counsel agreed that the personnel policies at issue in a TVA Motion *in Limine* filed April 5, 2002, would not be presented into evidence unless a TVA witness' testimony makes them relevant, which was agreed to by TVA counsel. Tr. 207-8.

5. TVA's Motion *in Limine* regarding certain tape recordings made by Mr. Fizer, which the NRC Staff has had enhanced and transcribed, was denied, with the following provision: Any transcripts will be used only as guidance, with the tapes themselves being the only evidence considered as such, and the NRC will provide copies of all enhanced recording and transcripts to TVA post haste, in order that TVA can counter any perceived inaccuracies in the transcripts with its own version of what is said on the tapes in question. Any necessary measures to mitigate any possible prejudice against TVA by virtue of the timing of the provision of the tapes and transcripts to TVA may be taken, as necessary. The quality and audibility of the tape recordings will be considered in determining what weight to give them in making a decision in the case. Tr. 208-12.

6. The parties agreed that, in lieu of the testimony of either Attorney Marquand or Attorney Vigliucci, the Staff may call other witnesses, including Mr. Donald Hickman, Ms. Cathy Welch, and Mr. Robert Beecken. Tr. 239-55.

7. All further objections to evidence shall be taken up in appropriate order during the evidentiary hearing. The parties were also advised to be prepared to omit witnesses whose testimony would be cumulative, in the interest of an efficient hearing process. Stipulations that such witnesses would testify to the same effect as other witnesses might be made in lieu of the actual testimony of such witnesses, and the Board may also suggest omitting cumulative testimony during the evidentiary hearing. Tr. 255-57.

8. The Board Chairman agreed to issue several subpoenas that are still required after the above rulings. (Such subpoenas were in fact issued on April 9, 2002, and transmitted to the

parties who sought them.) With regard to hearing exhibits, the parties agreed to provide notebooks of their exhibits, in the following categories: NRC Staff exhibits; TVA exhibits; and joint exhibits, which both parties intend to use. These shall be accompanied by detailed indexes to the exhibits. Each Board member will be provided with a complete set of exhibits, in mailable boxes; the court reporter will be provided with an original set and two copy sets of exhibits; and copies will also be provided for opposing counsel and for witnesses to utilize as necessary during their testimony. Tr. 237-38.

9. Any witnesses who have special needs or scheduling difficulties may be accommodated, and to facilitate this, counsel will bring any such issues to the attention of the Board in a timely manner. Tr. 259.

10. After the conclusion of the evidentiary hearing, counsel for both parties will be provided time to submit proposed findings of fact and conclusions of law. Tr. 212.

* * *

It is so ORDERED.

For the Atomic Safety and Licensing Board

/RA/

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 17, 2002

[Copies of this Order have been e-mailed this date to counsel for each party.]

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB FIFTH PREHEARING CONFERENCE ORDER (CONFIRMING MATTERS ADDRESSED AT APRIL 9, 2002, TELEPHONE CONFERENCE) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Docket Nos. 50-390-CIVP
50-327/328-CIVP and
50-259/260/296-CIVP
LB FIFTH PREHEARING CONFERENCE ORDER
(CONFIRMING MATTERS ADDRESSED AT
APRIL 9, 2002, TELEPHONE CONFERENCE)

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of April 2002