

1 A Yes, that's correct to say that your
2 record keeping is correct.

3 Q All right. And with respect to positions
4 that were eliminated, such as Mr. Fiser's, there were
5 also other positions eliminated in Operation Support.
6 Correct?

7 A That's correct.

8 Q And to the extent my record keeping is
9 correct, then TVA Exhibit 56 are the position
10 descriptions for all of those other positions that
11 were eliminated in the 1996 reorganization of
12 Operation Support.

13 A That's correct.

14 Q Now if you would look back at the other
15 notebook we had a minute ago, Joint Exhibit 49,.

16 MR. MARQUAND: I'm going to direct the
17 witness' attention to TVA Exhibit 113, and I note that
18 it's not with the other three official copies. And
19 Judge Bechhoefer mentioned this morning that you all
20 had received sets of exhibits from Chattanooga.

21 CHAIRMAN BECHHOEFER: We haven't looked
22 through them yet. They're right here.

23 JUDGE COLE: 113 is here.

24 MR. MARQUAND: Two copies?

25 JUDGE COLE: Three copies. What do you

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1 want to do with them?

2 MR. MARQUAND: I'm going to show the
3 witness a page out of TVA Exhibit 113.

4 BY MR. MARQUAND:

5 Q TVA Exhibit 113 are excerpts from NRC
6 Staff responses to discovery, and it includes several
7 documents. In the second document which is there on
8 page 2, and that second document is entitled, "NRC
9 Staff Response to Tennessee Valley Authority's Second
10 Set of Interrogatories." It's dated January 22, 2002
11 in the upper-right corner.

12 On the second page of that document,
13 Interrogatory Number 2, it asks the Staff to identify
14 each and every nuclear safety concern identified in
15 Mr. Fiser's '93 DOL complaint. And the response
16 includes a supplement, and it specifically says that
17 -- you see, Mr. McGrath, in the third sentence of the
18 response it says, "Fiser's September 23, '93 DOL
19 complaint sets forth a number of nuclear safety
20 concerns he raised, and are resolved, including co-
21 run." And then it talks about an issue with respect
22 to rad monitor effluent calculations, SCAR involving
23 a containment, rad monitor with proper alignment, and
24 a dispute over measuring of the three hour requirement
25 for post accident sampling. Do you see that?

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1 A Yes.

2 JUDGE YOUNG: Which page are you on now?

3 MR. MARQUAND: That was pages 2 and 3 of
4 Staff's responses to TVA's second set of
5 interrogatories.

6 JUDGE YOUNG: The first set, but I can't
7 seem to --

8 MR. MARQUAND: The second set is -- the
9 first set is 18 numbered pages. The next page is a
10 Certificate of Service. The page after that is Notice
11 of Appearance.

12 JUDGE YOUNG: Okay.

13 MR. MARQUAND: The next page is January
14 22, 2002, Response to Second Set of Interrogatories.
15 And I was referring to the second and third pages,
16 response to Interrogatory 2.

17 JUDGE YOUNG: Thank you. I have that.

18 BY MR. MARQUAND:

19 Q Mr. McGrath, I'd also like to refer you to
20 Joint Exhibit 49 which we talked about a while ago the
21 February 7th, 2000 letter from the NRC, transmitting
22 a Notice of Violation to you, personally. Do you have
23 that document?

24 A Yes.

25 Q If you would look at the second paragraph

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1 on page 1.

2 MR. MARQUAND: Our records show that that
3 was not identified or admitted at the previous
4 hearing, and I want to have that marked at this time,
5 Joint Exhibit 49.

6 (Joint Exhibit 49 marked for identification.)

7 BY MR. MARQUAND:

8 Q On Joint Exhibit 49, Mr. McGrath, that's
9 the Notice of Violation that the NRC sent to you
10 February 7th, 2000. Correct?

11 A That's correct.

12 Q It also includes a lot of other documents.
13 It looks li' the pre-decisional enforcement
14 conference notice and transcript, or agenda, and some
15 other documents which were provided at the pre-
16 decisional enforcement conference, various enclosures
17 to the letter. Is that correct, those are the
18 enclosures to the letter --

19 A Oh, I'm sorry. I didn't know you were
20 asking me that.

21 Q Yes.

22 A Yes, those enclosures were documents that
23 were used at the enforcement conference.

24 Q All right. Now I'd like to direct your
25 attention to the second paragraph of the February 7,

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1 2000 letter, the first page of Joint Exhibit 49.

2 A Okay.

3 Q Do you see the last sentence of that
4 paragraph that's referring to Mr. Fiser's protected
5 activities and says, "These protected activities
6 included Mr. Fiser's identification of chemistry-
7 related nuclear safety concerns in 1991 through 1993,
8 and the subsequent filing of a Department of Labor
9 complaint in September '93 that was based, in part, on
10 these chemistry-related nuclear safety concerns." Do
11 you see that?

12 A Yes.

13 Q Now, Mr. McGrath, since the last time you
14 testified in this proceeding, there has been testimony
15 showing that the concerns stated in Mr. Fiser's
16 complaint; that is, the concerns with the rad monitor
17 setpoints, the concerns with the misalignment of a rad
18 monitor, the dispute over how to time the three-hour
19 pass, were not issues raised by him.

20 There's been further testimony that his
21 Department of Labor complaint was a protest that he
22 was being held accountable for the existence of those
23 underlying chemistry issues. Given that testimony, I
24 would like to ask you to give me your assessment of
25 the conclusion on page -- two conclusions on page 2 of

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1 this letter.

2 The first conclusion I'm going to ask you
3 about your assessment of is in the second paragraph.
4 In the middle of that paragraph, in the middle of the
5 sentence it says, "The NRC concluded that your
6 involvement in the implementation of the
7 reorganization and selection process was at least, in
8 part, motivated by your and other's knowledge of Mr.
9 Fiser's prior protected activity."

10 The other conclusion of which I would like
11 your assessment is in the last paragraph of that page,
12 again just below midway, the sentence that says,
13 "Moreover, NRC concluded it was highly unlikely that
14 given your position in the organization and the number
15 of TVA employees who were involved in the various DOL
16 and TVA Inspector General interviews, that you were
17 completely unaware of the fact that Mr. Fiser filed a
18 '93 Department of Labor complaint until '96." What is
19 your assessment of those conclusions?

20 A In NRC's original letter they sent me,
21 they based their violation on a statement that I was
22 named as a culpable party in Mr. Fiser's original 1993
23 DOL complaint. I could understand how that statement
24 would raise questions in people's mind that obviously,
25 I must have known something about it. And two, if I

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1 was named as a culpable party, perhaps I would have
2 some sort of motive for taking some sort of action
3 against him because he accused me of something.

4 As was pointed out earlier, and even NRC
5 agreed, that particular statement was incorrect. I
6 was not named as a culpable party in that. In fact,
7 I'm not named at all, nor is there anything related to
8 the actions of NSRB or anything in that.

9 When NRC then moved on to the violation,
10 my reaction is that this was turned into somewhat of
11 a direct attack on my reputation, my credibility, my
12 integrity. I have stated earlier in these hearings,
13 in the enforcement conference, and in response to the
14 NOV that I had no knowledge of that original DOL
15 complaint. No involvement in it, no knowledge. I
16 didn't even know he filed it. Knew nothing of the
17 settlement of it. That is still the truth. I had
18 nothing at all to do with that.

19 There appears to me to be a need to
20 somehow connect me back to that in order to make a
21 basis for this, so when this violation came out, my
22 reading is that, all right. NRC has no evidence that
23 I had any involvement whatsoever in that, so in order
24 to make the case, we're just going to assume you had
25 involvement, that you were aware of them.

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1 That's personally of deep concern to me,
2 because when I first read this, I said well, they're
3 accusing me of lying. That's really a personal attack
4 on me, which I'm very deeply concerned about. They
5 didn't present evidence to support it. They just
6 stated it, as almost it was stated because they needed
7 to make the statement in order to support a case.

8 Within this case too then, is the
9 assumption that even if I had knowledge of some
10 protected activity, and either later on in the course
11 of this case it looked as though we were grasping for
12 straws to find, perhaps there's another protected
13 activity you knew about we can tie this to.

14 I think I mentioned to you last time, it
15 wasn't until, I believe it was November of last year
16 in a deposition that a question about a letter to
17 Senator Sasser comes up, and then in answers to
18 interrogatories to some obscure article in some little
19 town newspaper in Tennessee. You know, even if
20 somehow I knew something of some protected activity
21 done by Mr. Fiser, we now take this leap to say -- if
22 I was aware of a protected activity, just being aware
23 of it appears to be being taken as evidence that I had
24 a motive to somehow take action against him. And not
25 only is that totally inconsistent with my career - and

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1 let me explain that to you a little more - but even my
2 own thoughts on things.

3 Let me cover a couple of things. One, I
4 was Chairman of the Nuclear Safety Review Board. Now
5 the Nuclear Safety Review Board, as you all know,
6 there's a page full of requirements and the tech specs
7 of things we have to do. My view of the primary
8 purpose of a Nuclear Safety Review Board was to really
9 enhance the nuclear safety culture of the utility, to
10 provide the opportunity for independent view, to raise
11 questions, to challenge opportunities for improvement,
12 to try to raise issues really long before they become
13 a safety issue.

14 In order to do that, the Board really has
15 to have two things. It has to be aware of issues,
16 which probably meet the definition of protected
17 activities. But for the Board to be successful, it
18 also has to have an environment where raising those
19 issues are important. It's important for the Board to
20 function, that people feel free to talk to us about
21 those issues, without any kind of fear that if they
22 talk to us, someone will somehow retaliate, that if
23 one of those members, a manager on the Board or the
24 Chairman somewhere down the line might retaliate
25 against them because they raised an issue. It is

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1 totally inconsistent with the purpose of the Board.

2 When I was assigned to run the NSRB at
3 TVA, I probably mentioned this last time, they were
4 generally regarded both by TVA, NRC and others, as
5 ineffective, and I turned that around. You'll
6 probably find the old NRC inspection reports over the
7 years as to how satisfied they were with the
8 performance of the Board, and the issues we raised.
9 And I think that we were successful in contributing to
10 and enhancing the safety culture, and helped add to
11 the change in the TVA nuclear program over the years
12 that moved TVA from basically being in a regulatory
13 shutdown, to now being one of the best performing
14 utilities in the country. You can't do that without
15 having an environment that people not only are
16 encouraged to raise issues, but are very clear to them
17 there's not going to be any kind of retaliation for
18 raising the issue.

19 I don't know how the NRC can conclude that
20 when that was my job to do that, that I would now
21 retaliate against an individual for some issue that I
22 am not even sure I knew about. You know, I didn't
23 even know what the issue was.

24 If I could bring a second part. In
25 addition to my running the NSRB, in my time at TVA, I

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1 was also assigned as either a member or a leader in a
2 number of review teams, the Operational Readiness
3 Review Teams for the restart of all the Sequoyah and
4 Brown's Ferry units, for the initial start-up of Watts
5 Bar. When Sequoyah got into some regulatory issues,
6 I think it was around 1993, I was assigned to head-up
7 the team to investigate all that.

8 In doing those items, and I don't think
9 there's any purpose to be saved by adding additional
10 paper to all the paperwork you already have here, but
11 I could have brought with me hundreds of pages of
12 nuclear safety-related issues that either I
13 personally, or teams that I headed-up, identified.

14 To me, I just can't understand how someone
15 would think that if I identify large numbers of these
16 issues myself, that I would have a motive to take
17 action against somebody for, perhaps, raising one.

18 It's interesting that back in the time
19 frame of the chemistry problems in early -- late
20 1991/early 1992, one of the conclusions of the NSRB
21 was that the problems that were being identified
22 appeared to be recurrences because they were so
23 similar to problems that had been identified in the
24 1989 vintage Operational Readiness Reviews.

25 I was a member of that team. It would

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1 almost be saying here that I would have some reason,
2 a motive to retaliate against someone for, perhaps,
3 raising an issue that was the same issue that I,
4 myself, had raised a few years before. I'm very much
5 concerned that, what is the logic behind that? I
6 haven't seen anything that presented, in any of the
7 documentation or the enforcement conference, that
8 would support a reason for that type of conclusion.

9 I'd say that I was particularly concerned
10 relative to my reputation, my integrity. Well, my
11 current job in TVA is not in nuclear power. I spent
12 about 30 years in nuclear power between the Navy
13 Reactors Program and TVA. My primary job through all
14 that has been reactor safety oversight. And I think
15 I established a good reputation for doing that, and
16 raising such issues myself. That's why TVA selected
17 me to run these teams. That's why NRC was very
18 satisfied with the results of these teams. That's why
19 the Sequoyah restart, why the Region II administrator
20 ran into me on the site and came to ask me for my
21 opinion on how well the plant was doing, and how they
22 were doing in improving their performance. And I
23 think I had a very good reputation for doing that.
24 And you can really only do that if you set an
25 environment where people are willing to raise such

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1 issues, are willing to act on such issues, and have no
2 fear at all of raising such issues.

3 To conclude at this time in my career that
4 I actually went off and retaliated against someone for
5 raising a safety issue, well, I guess that kind of
6 destroys 30 years of reputation. You'd like -- you
7 know, the case trying to be put together here says
8 that I would wait many years, try to take action
9 against an individual at a time when I knew a DOL
10 case, the DOL complaint was filed. The TVA Inspector
11 General was actively investigating it. I knew that
12 every action we took would come under great scrutiny,
13 and would put at high risk both my current job at the
14 time, because if I were to take discriminatory action
15 against somebody, I knew that TVA would fire me. But
16 I would also totally ruin my career anywhere in the
17 nuclear power industry. If my expertise being Reactor
18 Safety Oversight, how could anybody hire someone to do
19 Reactor Safety Oversight who had been found guilty of
20 retaliating against people for raising reactor safety
21 issues?

22 I mean, it sounds -- if you look at it, to
23 me, it's almost ludicrous to think that I would risk
24 my entire career to go down and deliberately -- not to
25 talk about all the logistics problems of getting

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1 people in the Office of General Counsel, several Human
2 Resources Managers and others to all co-conspire with
3 me to do this.

4 So when I read this, you know, I don't
5 know why it's being pushed. It makes no sense to me.
6 They're asking you to believe that I would risk my
7 entire career. If this turns out -- if this come out,
8 I believe my career at all the nuclear power is over
9 with.

10 Now TVA has decided to restart Brown's
11 Ferry Unit I. A few years down the line, we will be
12 back into needing the safety reviews. I would like to
13 be in the position that if TVA comes to me and says
14 will you run those because I'm probably the most
15 experienced person in the country of running those
16 kind of reviews, having done so many in the TVA
17 program, that I could do that, because that would help
18 the company. It would also help ensure that we're
19 ready to safely restart that reactor. But they
20 couldn't do that if I had a cloud over my head that
21 said oh, yeah, but he retaliates against people who
22 raise safety issues.

23 MR. DAMBLY: At this point, I think we've
24 gone way beyond any question that was pending. And I
25 don't think Mr. McGrath's future plans for employment

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1 have any bearing whatsoever in this proceeding.

2 MR. MARQUAND: Well, I think he's finished
3 his answer. Your Honors, at this time, I would tender
4 into the record Joint Exhibits 46 and 49. 46 is the
5 origin -- it was identified previously. It is the
6 invitation to Mr. McGrath to attend the pre-decision
7 enforcement conference. Did I say that? Joint
8 Exhibit 46 and 49. 46 is the invitation to attend the
9 closed enforcement conference. 49 is the Notice of
10 Violation issued to him.

11 CHAIRMAN BECHHOEFER: Any objections to
12 those two exhibits? I'm asking if there's any
13 objection to the two exhibits that are being offered.

14 MR. DAMBLY: The only objection I have,
15 and I think we've addressed this before, is these
16 pertain to a different case. This is NRC versus the
17 TVA, the licensee. They want to put in documents from
18 NRC versus Mr. McGrath. It's a different case. And
19 to the extent that someone might think you're
20 adjudicating that case, I think it would be
21 inappropriate.

22 MR. MARQUAND: We're not asking the Board
23 to adjudicate that case, but those documents and the
24 allegations against Mr. McGrath are the basis for the
25 allegations against TVA in this case. And since Mr.

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1 McGrath has never had an opportunity to address those
2 issues on his own behalf, I think it's certainly
3 appropriate for him to exercise this forum to say that
4 here as well.

5 MR. DAMBLY: Well, I would object to the
6 last part of counsel's statement. He had an
7 opportunity, and he responded to NOV as per the
8 agency's regulations and the way business is done
9 here. It doesn't give him a right to come in here and
10 get on a soapbox about a different case.

11 JUDGE YOUNG: We're on the objection on
12 the exhibits. And I don't think you're arguing that
13 they're not relevant, are you?

14 MR. DAMBLY: I'm not sure they are, but
15 they go to a different case. The issues that are in
16 front of you are in the Notice of Violation for this
17 case.

18 (Judges confer.)

19 JUDGE YOUNG: We're going to overrule the
20 objection. Even though they involve a different case,
21 we find that the issues are inter-related, and
22 therefore, would be relevant.

23 JUDGE COLE: Now that was Joint Exhibit 46
24 and Joint 49. Correct?

25 MR. MARQUAND: Yes, Your Honor.

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1 JUDGE COLE: All right.

2 (Joint Exhibits 46 and 49 received.)

3 BY MR. MARQUAND:

4 Q Mr. McGrath, I'd like to direct your
5 attention to -- we talked about -- mentioned briefly
6 a minute ago that Dr. McArthur was placed in the Rad
7 Chem Manager position without competitive selection.
8 And there's been testimony that that decision to place
9 him in that position was based upon a determination
10 that he had a right to that job, it was essentially
11 the same as the job that he previously held. Did you
12 play any part in that decision?

13 A As I mentioned earlier, the original
14 determination from HR was that we should have
15 advertised that position. Mr. McArthur came to me,
16 raised a question relative to the job he had
17 previously held, which he thought was equivalent to
18 that position. I referred Mr. McArthur's question to
19 Ed Boyles in Human Resources, and asked him to look at
20 it.

21 I think, as I mentioned in the earlier
22 testimony, my reason for doing that was something I
23 had been involved with several years before, where HR
24 had advised me that if there were changes made within
25 certain short periods of time, that people retain

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1 their right to their prior jobs. And I knew that some
2 of the changes made relative to Mr. McArthur's prior
3 job had been made in very short periods of time, so it
4 sounded to me like there might be some merit to his
5 question, but I really didn't know those rules, so I
6 referred it to Human Resources.

7 Human Resources and Ed Boyles subsequently
8 came back to me and told me they had reviewed the
9 situation, and in this case, indeed, Mr. McArthur did
10 have a right to that position.

11 Q All right. Were you involved in
12 influencing in any way Mr. Boyles and HR's decision
13 that he had a right to that job?

14 A No, I was not. I referred it to them, and
15 asked them for their evaluation.

16 Q All right. And we've already mentioned
17 the TVA exhibits from all of the other positions
18 created in Operation Support, and those positions were
19 advertised on VPAs.

20 A That's correct.

21 Q Now assuming that the decision -- that Mr.
22 Boyles' decision was wrong, that McArthur's job should
23 have been posted, and that he didn't have a right to
24 the job, would that mistake, one way or the other,
25 whether to post that job or not post that job, did

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1 that have any influence or bearing, to your knowledge,
2 on whether or not the Chemistry Program Manager
3 position should have been posted?

4 A No, it had no bearing on it. The
5 Chemistry Program Manager, the decision to post that
6 had been made a month or two prior to the decision
7 relative to Mr. McArthur.

8 Q And for that matter, did the decisions
9 that the other many positions, new positions in
10 Operation Support had to be posted on VPAs, did those
11 decisions play any part in whether or not to post, to
12 post or not to post the Chemistry Program Manager job?

13 A Well, no, not to my knowledge. To my
14 knowledge, what Human Resources did, is they had
15 guidelines in which they'd made that determination.
16 And they applied those guidelines to all of the jobs
17 in Operation Support. And in fact, I believe at the
18 same time, there were several other reorganizations
19 going on within Corporate Nuclear at the time, and
20 applied those same guidelines to a number of other
21 positions in Corporate Nuclear.

22 Q Now you're aware that at some point in
23 time, Ron Grover complained about the failure to
24 advertise the Rad Chem Manager position, which Dr.
25 McArthur was placed in. Correct? At some point in

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1 time you learned that.

2 A Yes, at some point. I learned that later,
3 yes.

4 Q All right. Did anyone tell you in 1996
5 that Ron Grover was threatening to file an EEO
6 complaint over the failure to advertise that Rad Chem
7 Manager position, and give him an opportunity to apply
8 on it?

9 A Mr. Boyles mentioned to me, it was
10 probably August/September something of '96, that Mr.
11 Grover had raised EEO concerns relative to that.

12 Q And when he -- Mr. Grover has testified
13 that both Ed Boyles and Phil Reynolds told him that
14 they were wrong in deciding not to post that Rad Chem
15 Manager job. Did Mr. Boyles or Mr. Reynolds ever tell
16 you that they thought that they were wrong in their
17 decision not to post that job?

18 A No, they did not.

19 Q The last thing I'd like to ask you about
20 is the selection board -- about the selection process
21 and the board that met in July, and made the selection
22 for the Chemistry Program Manager jobs.

23 Did you provide any input into the
24 selection review board as to who should or shouldn't
25 be selected?

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1 A No, I did not.

2 Q Did you have any discussion with any
3 members of the board about the relative qualifications
4 or merit, or performance of any of the candidates?

5 A No, I did not.

6 Q There's been testimony that the selection
7 review board was provided books that included resumes,
8 names of the applicants, score sheets, questions, et
9 cetera. Did you see any of those selection books that
10 the SRB used in the summer of '96?

11 A No, I did not.

12 Q Have you seen them since then?

13 A I believe I've seen some portions of them
14 as part of like preparations for the enforcement
15 conference.

16 Q Did you have any input into the questions
17 that the selection review board asked?

18 A No, I did not.

19 Q Did you see any of the questions?

20 A No, I did not, until as I mentioned later,
21 as part of the preparations for the enforcement
22 conference. I believe I learned what a few of the
23 questions were.

24 Q Did you tell Dr. McArthur what questions,
25 or even what types of questions to use in the

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1 selection process?

2 A No, I did not. And let me add, that was
3 also consistent with a dozen or more positions that
4 were being filled throughout all of Operation Support.
5 I did not have any involvement in the documentation
6 provided to those boards, or any of the questions that
7 would be used.

8 MR. MARQUAND: No further questions, Your
9 Honors.

10 MR. DAMBLY: May we have a few minutes?

11 MR. MARQUAND: May we have an escort?

12 CHAIRMAN BECHHOEFER: Ten minutes is fine.

13 (Whereupon, the proceedings went off the
14 record at 3:00 p.m. and resumed at 3:14 p.m.)

15 CHAIRMAN BECHHOEFER: Okay. Back on the
16 record.

17 MR. MARQUAND: Judge, I had one more
18 question I needed to ask Mr. McGrath before I tendered
19 the Witness.

20 CHAIRMAN BECHHOEFER: Okay.

21 BY MR. MARQUAND:

22 Q Mr. McGrath, Mr. Fiser has testified that
23 the NSRB, when he was the Chemistry Superintendent at
24 Sequoyah, had suggested or recommended more trending.
25 And he's testified that he flatly refused to implement

1 or even consider that trending. Aside from whether or
2 not -- I'm not asking you whether or not the NSRB made
3 such a recommendation or not. Aside from that, would
4 it be appropriate for --

5 MR. DAMBLY: I'll object to the
6 characterization of Mr. Fiser's testimony. I don't
7 think that's what he said.

8 BY MR. MARQUAND:

9 Q Assuming that's what the record says, Mr.
10 McGrath, would it be appropriate for a manager at the
11 Plant to refuse to consider or to implement or even to
12 discuss with other Plant management an NSRB suggestion
13 without first exploring the feasibility or
14 practicability or possibility of such a
15 recommendation?

16 JUDGE YOUNG: Before you answer, let me
17 just ask this question first. Substitute "refused to
18 even consider, implement or" -- what was the other
19 thing?

20 MR. MARQUAND: I said flatly --

21 JUDGE YOUNG: Just say if the person were
22 to refuse to do it. Substitute that and take out the
23 other modifiers.

24 MR. MARQUAND: Well, let me ask -- why
25 don't I ask --

1 JUDGE YOUNG: There was an objection based
2 on what the testimony was.

3 MR. MARQUAND: I'll take out the "flatly
4 refused," but I mean I want to ask him whether it's
5 appropriate for a manager to refuse to consider or
6 refuse to implement or refuse to discuss with other
7 Plant management that suggestion without exploring the
8 feasibility or practicability.

9 JUDGE YOUNG: There was an objection, and
10 I can actually look up the testimony on here if you'd
11 like me to. My recollection was that the word
12 "refused" was definitely used. I don't recall whether
13 the others were. I don't think that it makes a huge
14 amount of difference, but to respond to the objection,
15 I think it would probably be more appropriate to just
16 use the word, "refuse."

17 MR. DAMBLY: And I believe that the
18 testimony was he never refused to do trending; he
19 refused to put something in a procedure which couldn't
20 be met and would result in violations. That's what he
21 testified to. There's no testimony ever about
22 refusing to trend anything.

23 JUDGE COLE: Yes. I think the record will
24 reflect what he said, but I think your
25 characterization is closer to my understanding, Mr.

1 Dambly.

2 CHAIRMAN BECHHOEFER: It's closer to mine
3 as well, my recollection.

4 JUDGE YOUNG: Do you remember what dates
5 Mr. Fiser --

6 MR. MARQUAND: Well, aside from the
7 testimony, let me refer to Mr. Fiser's own sequence of
8 events which he purported to transcribe, and that's
9 Joint Exhibit 27. At Page 52, Mr. Fiser states, "I
10 really cross those guys because they sat in my office,
11 Rob, and they demanded that I turn out 52 or 53 plots
12 every day, seven days a week, holidays, weekdays,
13 everything. I refused. I could not do that. It was
14 impossible." That's not just putting in procedure,
15 that's just doing the trending and refused to do the
16 trending as well.

17 JUDGE YOUNG: I think that fits with the
18 testimony that I recall.

19 MR. DAMBLY: I don't think that's his
20 testimony. That's what in this statement that he had
21 when he was discussing, but that's not what he
22 testified to.

23 MR. MARQUAND: Certainly, he sponsored the
24 document.

25 To resolve that issue, I'll restate the

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1 question. Mr. McGrath, is it appropriate for a
2 manager to refuse to follow a recommendation from the
3 NSRB without exploring the feasibility or
4 practicability?

5 THE WITNESS: No. I would not consider
6 that to be appropriate, and let me explain what I
7 mean. As you phrase it here, to refuse it without
8 consideration of the feasibility or appropriateness is
9 inappropriate. As I mentioned earlier, we really
10 endeavor to have a nuclear safety program or culture
11 which one of the key attributes of that is critical
12 self-assessment. The NSRB in no way attempts to
13 declare itself infallible that should the NSRB make a
14 suggestion you just have to go run off and do it. An
15 expectation is that given the caliber of the
16 individuals who are on this Board, their experience
17 elsewhere in the industry, that if a suggestion is
18 made, it should be given some due consideration.

19 My experience has been that actually some
20 of the best actions were taken where the management of
21 the site really questioned what NSRB suggested, so
22 they understood what was behind it, and in looking at
23 it, may not have done what NSRB suggested but one
24 often did something a little different or changed a
25 current process or something in order to address what

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1 really the point was behind it. And that's what I
2 really think is appropriate. If NSRB suggests
3 something, you need to give it due consideration and
4 understand why.

5 BY MR. MARQUAND:

6 Q Thank you, Mr. McGrath.

7 CHAIRMAN BECHHOEFER: Let me follow up a
8 little bit, though. It was my understanding that the
9 refusal or the declining to take particular actions
10 was motivated by a lack of adequate resources to do
11 that now. Would the expectation be then that the
12 manager take certain steps to obtain greater resources
13 or on several occasions I believe Mr. Fiser mentioned
14 that he attempted to get greater resources, and when
15 he couldn't it would disrupt the operations of his
16 organization to do the additional trending without
17 adequate staffing and resources to do that. That's my
18 understanding.

19 THE WITNESS: Your Honor, let me answer in
20 general without -- and I don't know the answer now
21 back on this whether there was adequate resources for
22 this particular item or not, but I would think the
23 adequacy of resources and the relative balance as to
24 how you can use those resources and most effectively
25 use them is an appropriate consideration when you're

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1 looking at something like that. I can't answer
2 whether or not there were -- whether there was really
3 a resource issue relative to this specific item or
4 not.

5 CHAIRMAN BECHHOEFER: But would a refusal
6 based on adequate -- sorry, inadequate resources be
7 different from just a flat refusal or to consider an
8 issue? Maybe the word "flat" shouldn't be in there
9 based on previous --

10 THE WITNESS: Somewhat I'm talking
11 hypothetical situations on the thing. If a suggestion
12 was made, and if I may use something other than this
13 specific one so we're not discussing whether trending
14 or not, whether there were adequate resources. If
15 NSRB was to make a suggestion, and whether the issue
16 be resources -- well, resources may not be just
17 people, it may be adequate computer capacity or
18 whatever -- certainly, what it would take to do it is
19 a consideration -- is a valid consideration and
20 considering the resources required to do something
21 against the relative benefits you would get out of it.
22 I would consider that to be a consideration, and you
23 have to balance it. If it really was a significant
24 safety issue, the answer might be go get those more
25 resources. If it was simply an enhancement, it could

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1 very well be a conclusion that says, hey, the
2 resources required to get that enhancement aren't
3 worth the benefits you'd get out of it.

4 CHAIRMAN BECHHOEFER: Thank you.

5 BY MR. MARQUAND:

6 Q But is the adequacy of resources an issue
7 that management should look at and address and
8 determine whether that cost/benefit justifies pursuing
9 more resources.

10 A As I said, that would be one of the things
11 you would look at if it was the type of issue where
12 resources were involved.

13 JUDGE COLE: Mr. McGrath, you and one
14 other person from the NSRB discussed the possibility
15 of increasing trending with Mr. Fiser, did you not,
16 sir?

17 THE WITNESS: At the Subcommittee meeting,
18 where Mr. Peterson who is an outside advisor --

19 JUDGE COLE: Tom Peterson?

20 THE WITNESS: Tom Peterson and Wilson
21 McArthur were discussing a number of subjects, which
22 included trending, with Mr. Fiser and other members of
23 the Chemistry staff, and the Corporate Chemistry staff
24 were involved as part of that NSRB activities that
25 day. I joined them at one point. The point is I do

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1 not remember trending being discussed while I was in
2 the room, and so I --

3 JUDGE COLE: Then I can't ask you the next
4 question.

5 MR. MARQUAND: I tender the Witness, Your
6 Honor.

7 CROSS EXAMINATION

8 BY MR. DAMBLY:

9 Q Mr. McGrath, you were asked on direct
10 about the diesel fuel oil sampling issue in the LER;
11 do you recall that?

12 A The issue that Mr. Marquand asked me about
13 a little bit earlier?

14 Q Yes.

15 A Yes.

16 Q And I believe you testified you never
17 discussed that with anyone in Sequoyah Management? Is
18 that true?

19 A Yes.

20 Q How did you learn about the issue?

21 A Mr. Marquand asked me about the issue
22 somewhere in the preparations for this. I told Mr.
23 Marquand at the time, I asked him if he was referring
24 to an issue I remembered several years later that had
25 to do with a tech spec change for the diesel fuel oil

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1 tanks. I really don't remember what that tech spec
2 change was. And he told me, no, it wasn't and showed
3 me an LER that had been written about it.

4 Q So before that you didn't know about it at
5 all.

6 A No, unless I read somewhere -- there's so
7 many things that I don't -- that was relative to the
8 preparation for this whole case. It may have been a
9 couple of years ago that I had, but prior to that I do
10 not have any recollection of knowing anything about
11 that. It is certainly a possibility that in my NSRB
12 mail I have read the LER back that many years ago, but
13 particularly in that time frame at Sequoyah we had a
14 lot of LERs to read.

15 Q You also testified -- responded to some
16 questions by Mr. Marquand about in '94 there was this
17 group that did chemistry and environmental work under,
18 I guess, Mr. Grover. Do you recall that?

19 A Well, I took over as the head of
20 Operations Support in October of 1995.

21 Q I'm referring to just earlier this
22 afternoon. Mr. Marquand asked you questions about did
23 you have expectations that the people under Mr. Grover
24 were going to perform the environmental functions that
25 were in their positions?

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1 A I felt his question was referring to when
2 I -- after I became General Manager of Operations
3 Support in October of 1995.

4 Q Okay, 1995. And you said you expected
5 they'd be performing those environmental functions.

6 A That's correct.

7 Q Did you look at their position
8 descriptions to see what their functions were?

9 A No, I did not.

10 Q Do you know how the positions came about?

11 A No, I do not.

12 Q What's the basis for your statement?

13 A I knew the responsibilities of the
14 Chemistry and Environmental Group. You may recall
15 back in my earlier testimony the Chief Nuclear Officer
16 had requested my predecessor in the job to perform a
17 review of the functions of the Organization and the
18 Organization, whether they were properly aligned.
19 When I took over, a document I received, which I
20 believe was entered into the record back in April, was
21 an organization and functional chart that had been put
22 together by Operations Support which under each of the
23 various groups listed what the responsibilities of
24 those groups were. And by reviewing that, I knew what
25 the responsibilities of the groups were.

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1 Q All right. And do you have any evidence
2 that in point of fact Mr. Grover's group was not
3 performing its responsibilities?

4 A I have no evidence that they were not
5 performing.

6 Q Do you know whether or not Ms. Nida was in
7 fact doing the environmental work that was the
8 responsibility of that Organization?

9 A As I stated earlier today, from my
10 perspective the responsibility belonged with Mr.
11 Grover, and it was up to Mr. Grover as to how he used
12 his employees to effectively perform those functions.

13 Q Mr. Marquand prefaced his question with a
14 statement that Mr. Fiser has testified he was doing
15 practically none or maybe five percent, at most,
16 environmental work. Is that a problem for you?

17 A It would have been a problem if I was
18 aware of it. He did not tell me of that nor in the
19 few months when I first got into this job did I have
20 any indication from the groups he was supposed to
21 serve or anything that was supposed to be being done
22 that it was not getting done.

23 Q And would it surprise you to know that
24 yesterday in that very chair you're sitting in Mr.
25 Harvey told us he was doing 95 percent chemistry and

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1 five percent other work?

2 A That's certainly possible.

3 Q That wasn't anything unusual about what
4 Mr. Fiser was doing at that time under Mr. Grover, as
5 far as you know?

6 A I don't know what Mr. Fiser was doing
7 under Mr. Grover relative to environmental work at the
8 time.

9 Q And you mentioned something about training
10 for Mr. Harvey? Was he sent to a training course?

11 A I don't remember the specifics. It may
12 have been a training course, it may have been required
13 reading. I do not recall the specifics.

14 Q Now, did you -- you reviewed the memos or
15 the notes that Mr. Grover and I guess Mr. McArthur had
16 sent to Mr. Harvey concerning those incidents?

17 A I do not recall seeing those memos.

18 Q What were you told by Mr. McArthur -- or
19 Dr. McArthur about those?

20 A As I mentioned earlier today, McArthur
21 told me that there had been an allegation. This many
22 years later I don't remember the specifics of what he
23 may have told me what the allegation was. He told me
24 that the alleged violation could not be substantiated,
25 was unfounded, but as part of it that he had made a

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1 decision to provide some additional training to Mr.
2 Harvey.

3 Q I'll show you Staff Exhibit 67. Would you
4 take a moment to look at that?

5 A Okay. I've looked at it.

6 Q You note in the second paragraph where it
7 says, "Mr. Harvey acknowledged these incidents that
8 occurred and stated he was unaware of the impact of
9 his behavior toward Ms. Landers." Yes?

10 A Yes.

11 Q And you notice Mr. McArthur -- Dr.
12 McArthur is a cc on this document?

13 A Yes.

14 Q And your testimony is Dr. McArthur told
15 you these were unfounded and couldn't be proven.

16 A Mr. McArthur told me as well that they
17 were -- that allegations of intimidation and
18 harassment were unfounded. Now, as I read this
19 particular document, it said that what he did was
20 deemed inappropriate and insensitive, that this does
21 not say that he was -- that he violated something
22 relative to employee intimidation and harassment,
23 which I don't remember the definitions of it, but I
24 read this to say that they looked into it and saw that
25 what he had done may have been inappropriate but

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1 didn't meet those requirements because it just said he
2 agreed to exhibit better behavior in the future and he
3 was going to go to some training.

4 Q Is inappropriate and insensitive what you
5 look for in a manager?

6 A No, that definitely would be a weakness
7 that someone would have to have worked on.

8 Q Now, when you testified years ago now,
9 whenever it was we were in Chattanooga the first time,
10 do you recall a discussion about the '96 reorg and who
11 made the decision as to what the positions were going
12 to be under the combined RadCon and Chemistry
13 organization?

14 A Yes.

15 Q And do you recall saying that you're the
16 one that told McArthur and Grover just come up with
17 what they needed, and they're the ones that decided
18 there would be a PWR and a BWR manager position?

19 A Yes. They made the split of PWR/BWR.
20 There would have been other ways to split the
21 responsibilities.

22 Q Would it surprise you to know that both
23 Mr. Grover and Dr. McArthur said that you made that
24 decision immediately and told them from the beginning
25 there would be one PWR and one BWR position?

1 A That is not true; I did not do that.

2 Q So they both misunderstood you?

3 A In fact, the original proposals that they
4 came back with had different organizations, and it had
5 organizations that were based -- they had different
6 splits and responsibilities as well as different
7 numbers of people.

8 JUDGE YOUNG: Are you saying they came
9 back with several alternatives; is that what you're
10 saying?

11 THE WITNESS: Originally, they came back
12 with several alternatives. The original alternatives,
13 they were not in accordance with the overall planning
14 guidelines I had given the entire department, and they
15 were not the only department who came back where their
16 first cut wasn't in accordance with the requirements.
17 And the requirements -- one of the requirements I sat
18 down is I wanted them to look at what would be the
19 logical long-term organization and then take the first
20 logical steps that we could take to get to that
21 organization.

22 If I could use an example in one other
23 group, the Maintenance group originally proposed an
24 organization with two supervisors. The logical long-
25 term organization was just one. There weren't enough

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1 people to substantiate having two supervisors. But
2 like some of them said, well, we could probably meet
3 next year's budget goal and keep the second
4 supervisor. Well, I turned that down because we
5 wanted to take the logical step to get where we needed
6 to go.

7 And the original proposals, which split up
8 Chemistry and RadCon differently, and I don't remember
9 the specifics of them all right now, were similar to
10 that in that basically the basis for the proposals was
11 to minimize head count reduction, not to move towards
12 a logical final state. The logical final state, which
13 had been based on benchmarking, which had been done
14 prior to my coming into the group, indicated that
15 having two Chemistry specialists would be sufficient
16 for our needs and the size of our program. Point out
17 to you that about a year after we did this
18 reorganization there was another reorganization of
19 Corporate which was done on a different type of
20 functional review, and the Chemistry and RadCon
21 organization was left unchanged, that based upon that
22 -- that other review confirmed that it was a logical
23 way to organize. An example of another way to
24 organize rather than going BWR/PWR would have been to
25 split it primary Chemistry/secondary Chemistry.

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1 BY MR. DAMBLY:

2 Q All right. Now, back to my question. Did
3 you or did you not tell Grover and McArthur you wanted
4 one PWR and one BWR Chemistry Manager position in the
5 new organization?

6 A I did not.

7 Q So when both of them said that's what you
8 did, they didn't understand you.

9 A Or perhaps as you're asking these
10 questions seven years later, they're having trouble
11 recollecting what was said.

12 Q Ah. Now, in the reorganization in '96 of
13 your organization, the Operations Support, and I think
14 we've covered this during your first testimony but it
15 wasn't real clear this afternoon, in point of fact,
16 other than Dr. McArthur no positions in that
17 organization were non-competitively filled during the
18 reorganization?

19 A Of the new positions, that is correct. I
20 mean there were some other positions that were deemed
21 to be essentially unchanged and the incumbent just
22 stayed in.

23 Q What were those positions?

24 A For example, in the Maintenance group, we
25 had a turbine expert. We still had a turbine expert.

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1 The only change in his position description was the
2 manager to whom he was reporting.

3 Q As I recall, the last time when you were
4 asked this question, in fact and one of the judges
5 even said, "So nobody was performing the same
6 functions after the reorganization as they were
7 performing before," and you said that was correct.

8 A I was referring to all of the new
9 positions. There were a certain number of positions,
10 and the example would be the turbine expert, the valve
11 expert in the Maintenance group, where their positions
12 were unchanged by the reorganization.

13 Q Now, you indicated you wouldn't
14 intentionally discriminate against Mr. Fiser because
15 you knew TVA would fire you if you did it. Remember
16 that?

17 A Yes.

18 Q And I think we covered this the last time
19 in your testimony, do you know who Joe Bynum is?

20 A Yes.

21 MR. MARQUAND: If we covered it the last
22 time, I'm going to object.

23 MR. DAMBLY: Well, everything that you
24 covered today we covered the last time, and he opened
25 the door with his testimony.

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1 CHAIRMAN BECHHOEFER: Oerrule the
2 objection.

3 BY MR. DAMBLY:

4 Q And in point of fact, the NRC issued an
5 order barring Mr. Bynum from licensed activities for
6 five years for intentional whistleblower
7 discrimination; is that correct?

8 A I'm not sure. I don't know the specifics
9 of everything that came out of that particular case.
10 I don't remember them now.

11 Q Oh. So when an order is issued to a high
12 level manager at TVA nobody hears about it; is that
13 right?

14 A No, I didn't say that.

15 Q You don't know --

16 A It was quite a number of years ago. If
17 you're asking me the exact provisions of that, I'm not
18 positive that I remember the exact provision. I know
19 there was an order.

20 Q Do you know what the basis of the order --

21 A I know there was an order and that Bynum
22 was not allowed to participate in nuclear for some
23 period of time.

24 Q And you know he wasn't terminated.

25 A That's correct.

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1 Q In point of fact, he was transferred to
2 the non-nuclear side of TVA at the same pay?

3 A I know nothing at all about Mr. Bynum's
4 pay.

5 Q What's the basis for saying you're going
6 to be fired?

7 A The statement I was making was that if I
8 actually did discriminate against someone and TVA
9 found that I did, I would expect to be fired. The
10 fact that NRC issued that order against Mr. Bynum does
11 not necessarily mean that TVA agreed that he actually
12 did it. In this particular case here, TVA is
13 appealing this violation. TVA does not agree that any
14 discrimination happened in this case.

15 Q And so then in this case, no matter what
16 the finding, TVA doesn't think you did anything wrong,
17 so you don't have anything to worry about.

18 A I don't know what TVA will do when the
19 outcome of this case is finalized. What I was
20 answering was that if I really did something like
21 that, I would expect to be fired for doing it.

22 Q Now, with regard to Mr. Grover in the EEO
23 complaint, did it surprise you when the only African
24 American manager that you had in your organization was
25 the position for which he could have competed was non-

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1 competitive given that Mr. McArthur that somehow that
2 would lead to a complaint?

3 A I'll try to answer your question, and if
4 we talk about -- Mr. McArthur -- you make it sound
5 like it was just given to Mr. McArthur.

6 Q Well, we've had a lot of testimony about
7 that.

8 A My understanding is under the Human
9 Resources rules he had a right to the position and
10 that's why he was put in the position.

11 Q They haven't talked to you since the last
12 testimony?

13 A I can't exactly specify on what may or may
14 not motivate Mr. Grover to whether he would submit a
15 complaint afterwards or not.

16 Q In regard to NSRB roles and interactions
17 with the staff, I'd like to read to you from Mr.
18 Richey's testimony in this hearing. It starts at Page
19 4695 in response to a question from Judge Young, and
20 at the bottom of 4695, Mr. Richey says, "And the NSRB
21 was more, from what I remember, more confrontational
22 than they have been in the last ten years. Now it's
23 more of a real discussion about what you are doing
24 about your problems and what problems have been
25 identified, and, yes, they will bring things up. But

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1 I have never seen anything since then that was as, and
2 I'll say antagonistic for lack of a better word, as I
3 remember during that time period." Are Mr. Richey's
4 perceptions of dealing with the NSRB inaccurate?

5 A I'm not sure I understand what his
6 perceptions are and what the time periods were that
7 you're referring to.

8 Q The time period -- this line of
9 questioning had to do with the 1991 NSRB meeting,
10 Subcommittee meeting on trending. That's what the
11 train leading into this was about, and that was the
12 discussion. So back in 1991, back at that meeting.

13 A And he's referring to the ten years prior
14 to that?

15 Q No. He's saying since then, in the last
16 ten years, it hasn't been like it was then. Do you
17 want me to read it to you again?

18 A I didn't understand what the ten meant.
19 I really cannot comment on particular subcommittee
20 meetings or how they were all carried out over time.
21 We have changed a lot of members over the years. In
22 the particular meeting in question, there were two
23 issues at that meeting, both of which had been open
24 items with Sequoyah for six to nine months over which
25 they had taken no action. One had to do with post-

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1 accident sampling and demonstrating the ability to
2 meet the NUREG-0737 requirements, and the other was on
3 an issue of unmonitored release pass. Both of those
4 had been open for a number of months; in fact, for the
5 part of the meeting I was in, in two of them, there
6 was a fair amount of confrontation there between the
7 Corporate Chemistry Manager and the Site Chemistry
8 Manager who both disagreed strongly on the issues.
9 But that particular meeting had a number of issues
10 that I would not expect that would come up routinely,
11 and fortunately we got by the point of there being
12 issues that stayed outstanding for extended periods of
13 time.

14 Q All right. Now, one last area of
15 questions, and hopefully we can get Mr. Fogleman in
16 here. You stated in the speech you made at the end of
17 your testimony that you couldn't see any basis at all
18 how NRC could conclude you had anything to do with the
19 '93 to '96 complaints by Mr. Fiser or any activities
20 out of there, and it would only take a witch hunt to
21 try and tie you to any of that.

22 A No. I didn't say that. You're trying to
23 tie it to the '96 complaint. I never mentioned the
24 '96 complaint.

25 Q Just the '93 complaint?

1 A And a witch hunt is your characterization.

2 Q Well, what did you say?

3 A Do you want me to go back and do that all
4 again?

5 MR. MARQUAND: He's --

6 BY MR. DAMBLY:

7 Q Did you not say there was no basis by
8 which the NRC could rationally conclude that you had
9 any involvement whatsoever?

10 A The NRC in any documentation made
11 available to me by NRC, by anything stated by NRC at
12 the Enforcement Conference or at any of these hearings
13 is I have not heard anything that would rationally tie
14 me to the 1993 complaint.

15 Q All right. Do you remember there being a
16 1996 complaint?

17 A The 1996 complaint, that had to do with
18 the posting of the position?

19 Q And do you recall the '93 complaint being
20 a subject in the '96 complaint?

21 A I recall that the 1996 complaint totally
22 recharacterized the 1993 complaint and made statements
23 in it that there were issues raised in the 1993
24 complaint that were not actually raised in the 1993
25 complaint. And the total characterization of the 1993

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1 complaint in the '96 one was totally false.

2 Q Do you recall there being a Motion for
3 Summary Disposition filed on behalf of TVA in that
4 complaint at DOL?

5 A Which complaint are we talking about?

6 Q .Ninety-six.

7 A I recall that TVA made a submittal to DOL.

8 Q Do you recall the administrative law judge
9 denying the Motion for Summary Disposition?

10 MR. MARQUAND: Objection. We've been
11 through this before, and that's not relevant to
12 anything. What the judge decides with respect to
13 summary judgment, whether the judge may think there's
14 material issues of fact is not pertinent to anything
15 this Board has to decide. Motion on summary judgment
16 which is denied is not dispositive of anything. It
17 doesn't decide anything.

18 JUDGE YOUNG: What's your purpose for
19 offering -- asking --

20 MR. DAMBLY: My purpose is very simple.
21 He said that the NRC could not have rationally
22 concluded from anything that was presented to anybody,
23 here, there or anywhere, that there was any basis to
24 connect him to the '93 complaint. We have an order
25 from an administrative law judge at the Department of

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1 Labor which has a section called, "Undisputed Facts,"
2 which specifically states the complaint was based on
3 new procedures required by -- the September 23, '93
4 complaint was based on new procedures required by Tom
5 McGrath, Chairman of the NSRB, and Wilson McArthur, a
6 member of the same Board.

7 MR. MARQUAND: That's not --

8 MR. DAMBLY: That's undisputed. It's
9 listed as undisputed facts, and that's based on the
10 briefs submitted by Mr. Marquand and by Mr. Fiser and
11 his attorney and all the depositions and whatever that
12 were included in that. And there are more statements
13 along those same lines dealing with Mr. McGrath. If
14 we're going to have to listen to speeches about how
15 irrational we are, then I think -- was the Department
16 of Labor irrational? Were they out to get you?

17 THE WITNESS: I believe if you read that,
18 that it was very clear to me that the Department of
19 Labor judge made his decision, probably like OI did
20 originally, by reading the 1996 complaint
21 characterization of the 1993 complaint. If you go
22 back and actually read the 1993 complaint, there is no
23 mention whatsoever of trending, there is no mention
24 whatsoever of me. If the administrative law judge for
25 the DOL lists as an undisputed fact that that was in

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1 the 1993 complaint, I contend that he was wrong, and
2 he probably never read the '93 complaint; he relied on
3 the 1996 characterization of the '93 complaint.

4 BY MR. DAMBLY:

5 Q Did you review what your Counsel filed?
6 Do you know if they disputed that fact in '96?

7 MR. MARQUAND: Your Honors, I'm going to
8 continue to object. What is submitted in summary
9 judgment is not dispositive of anything. It doesn't
10 -- it's not --

11 MR. DAMBLY: It constituted admission.

12 MR. MARQUAND: It's not res judicata, it's
13 not precedent, it's not an admission.

14 MR. DAMBLY: Yes, it is.

15 CHAIRMAN BECHHOEFER: I think it may --

16 MR. MARQUAND: But what the judge says is
17 not an admission by anyone. If he wants to submit
18 something that says we made an admission of something,
19 I'd like to see it. But what the judge states with
20 respect to it, if the judge is in error, is not an
21 admission by TVA. It's certainly not precedence, it's
22 not law of the case, it's not res judicata.

23 JUDGE YOUNG: I'm not sure that engaging
24 in argument with the Witness over what happened in
25 another legal case is really that pertinent to what we

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1 have to decide.

2 MR. DAMBLY: Well, I don't have
3 necessarily a disagreement, although I think if I was
4 to file their motion, that clearly would be an
5 admission. And when you are in a summary disposition
6 state, if somebody alleges a fact and you do not
7 dispute it, that is an admitted fact. So I think that
8 would be relevant. But beyond that, they opened the
9 door with this long speech about the NRC's lost its
10 mind, they've got no basis for anything, nobody could
11 rationally conclude. If they want to tell me the
12 Department of Labor is irrational too, then I think
13 that at least puts in context the testimony.

14 JUDGE YOUNG: I guess what I would have to
15 say would be that up until the end of Mr. McGrath's
16 testimony you did not object, and certainly you have
17 the right to cross examine, but I'm not sure that it's
18 a very efficient use of any of our time to argue about
19 what happened in another legal proceeding with this
20 Witness. You can make your arguments to us, either
21 verbally at the conclusion of the hearing or in
22 proposed findings of fact and conclusions of law.

23 MR. DAMBLY: Well, we can't make them if
24 this is not in the record.

25 CHAIRMAN BECHHOEFER: We have admitted

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1 into evidence documents relating to a different
2 proceeding, and I think on the same rationale I would
3 allow the questions to go forward here.

4 JUDGE YOUNG: I think some leeway is in
5 order, but keep in mind that if lawyers file
6 something, I'm not sure how much a witness would have
7 to say about the legal documents that are filed by
8 lawyers and how helpful that is or how that efficient
9 that is in terms of how to spend our time at this
10 hearing. With that said, we'll allow you a little
11 leeway.

12 MR. DAMBLY: I think I've asked the
13 question I was interested in. I would, at this point,
14 however, since we've now admitted NOBs and statements
15 by Mr. McGrath in a case that is not this case, I
16 would like to move in Staff Exhibit 147, which is the
17 brief in support of the Motion for Summary Decision
18 filed by TVA, and Staff Exhibit 148, which is the
19 order denying the Motion for Summary Decision. And I
20 would note that Staff Exhibit 147 was signed by Mr.
21 Slater and Mr. Marquand.

22 JUDGE YOUNG: Any objection?

23 MR. MARQUAND: Yes, Your Honor. I still
24 contend that the Motion for Summary Judgment and what
25 is said in response to it is not -- in another

1 proceeding provides no basis for this Board to make
2 any sort of decision. The fact that TVA makes a
3 Motion for Summary Judgment and contends that certain
4 facts are undisputed doesn't mean that the other
5 allegations are conceded. And the fact that the judge
6 comes back and says, "Well, based on what Mr. Fiser
7 says, I'm making a determination of undisputed facts,"
8 is not binding in that case. It's certainly not
9 precedential or res judicata or collateral estoppel in
10 this case and would have no bearing in this case. The
11 fact that TVA decides to pursue summary judgment on
12 one issue doesn't mean that there may not be other
13 grounds in that case to proceed.

14 JUDGE YOUNG: Let me stop you. Let's try
15 to separate out the issue of res judicata or
16 collateral estoppel, because I don't think that's
17 what's being argued. And, certainly, on the Motion
18 for Summary Judgment or Summary Disposition, I would
19 agree with you. So let's take that off the table, and
20 if you could just address the relevance of this.

21 MR. MARQUAND: All right. One forty-seven
22 is TVA's brief in support of its Motion for Summary
23 Judgment. I don't think Counsel is arguing that TVA's
24 motion should have been granted nor do I think he is
25 asserting that the facts as stated by -- that he

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1 agrees with the facts as stated by TVA in that brief.

2 JUDGE YOUNG: But would it not be relevant
3 to what TVA's position would be with regard to the
4 same set of facts as are at issue in this case?

5 MR. MARQUAND: I don't know that TVA's
6 position has changed.

7 JUDGE YOUNG: Then what would your
8 objection be?

9 MR. MARQUAND: What possible relevance is
10 it? He's not contending that we've changed our
11 position. That's not what he's arguing. He's arguing
12 --

13 JUDGE YOUNG: He's relying on your brief
14 as a statement of what your position was and certain
15 statements that you made with regard to what the facts
16 were or are with regard to the same set of facts that
17 underlay the case before the Department of Labor and
18 that are at issue in this case.

19 MR. MARQUAND: I didn't hear him make that
20 argument. With due respect, I heard him argue that
21 the judge's decision on summary judgment -- I heard
22 him argue that the judge's decision on summary
23 judgment was a statement of the undisputed facts.

24 JUDGE YOUNG: We haven't read either one
25 of them, so let's limit the argument at this point to

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1 TVA's brief, and I think that what we have drawn from
2 Mr. Dambly's statements is that he's relying on what
3 TVA said in its filings in the Department of Labor
4 case, specifically it's Motion for Summary Disposition
5 and I guess the brief in support of it. And so what
6 I'm asking you is what's your objection?

7 MR. MARQUAND: Well, let me take a brief
8 break and look at the document. I may not have an
9 objection.

10 JUDGE YOUNG: Okay. And if we've
11 misstated your position, Mr. Dambly, feel free to
12 correct us.

13 MR. DAMBLY: No, Your Honor.

14 (Whereupon, the foregoing matter went off
15 the record at 4:01 p.m. and went back on
16 the record at 4:07 p.m.)

17 MR. MARQUAND: Your Honor, I'm finished
18 reviewing Staff Exhibits 147 and 148. Staff Exhibit
19 147 is the brief in support of his Motion for Summary
20 Decision, filed by myself -- and I don't see a
21 signature on it -- filed by myself and Mr. Slater,
22 with the understanding that these are statements of
23 counsel and certainly statements of counsel made a
24 long time ago before all of the facts were well
25 understood. I don't really object to this document.

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1 I believe it's essentially consistent with everything
2 we've said in this case.

3 With respect to Complainant's 148, the
4 order denying the Motion for Summary Judgment, that's
5 Judge -- as you know, Judge Phalen is the Department
6 of Labor Administrative Law Judge, and he was
7 reviewing a Motion for Summary Judgment in a light
8 most favorable to the Complainant based on assertions
9 made by the Complainant. And as such, he states facts
10 that he finds, and I don't know whether it's fair for
11 his statement that those are undisputed facts or not,
12 but those are -- as you know, on summary judgment, he
13 has to take the disputed facts in the light most
14 favorable to the Complainant, and he may have made a
15 misstatement there where he says those are undisputed
16 facts. And in fact, I don't -- with that
17 understanding of the standards for summary judgment,
18 I don't object to Complainant's Exhibit 148.

19 JUDGE YOUNG: You don't?

20 MR. MARQUAND: I don't think it proves
21 anything.

22 JUDGE YOUNG: If you have no objection,
23 then they'll both go in.

24 CHAIRMAN BECHHOEFER: Yes.

25 MR. DAMBLY: And we have no further

1 questions.

2 CHAIRMAN BECHHOEFER: Okay. And the Board
3 will admit TVA Exhibits 147 and 148.

4 JUDGE COLE: NRC Staff Exhibits 147 and
5 148.

6 CHAIRMAN BECHHOEFER: I'm sorry, Staff
7 Exhibits 147 and 148.

8 (Whereupon, the above-referred
9 to documents, previously marked
10 as Staff Exhibit Nos. 147 and
11 148 for identification, were
12 admitted into evidence.)

13 MR. MARQUAND: May the Witness be excused,
14 Your Honor?

15 CHAIRMAN BECHHOEFER: Pardon?

16 MR. MARQUAND: May the Witness be excused?

17 CHAIRMAN BECHHOEFER: I have one or two
18 questions. Do you have further questions?

19 MR. DAMBLY: I have no further questions,
20 so far.

21 CHAIRMAN BECHHOEFER: Okay.

22 JUDGE YOUNG: Do you want to go ahead or
23 shall I?

24 CHAIRMAN BECHHOEFER: I just have a couple
25 of very short ones.

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1 JUDGE YOUNG: If you want to go ahead.

2 CHAIRMAN BECHHOEFER: Yes, I'll -- Mr.
3 McGrath, when the matter concerning the placing of Dr.
4 McArthur in his position without competition was
5 referred to you, were there any views expressed by the
6 person who was doing the referral?

7 THE WITNESS: The question about Mr.
8 McArthur being appointed was actually raised by Mr.
9 McArthur. He came to me and he raised the question as
10 to whether or not he should really have the right to
11 the position. The basis that he mentioned to me, and
12 this is what triggered my thoughts of the timing
13 issue, there had been a reorganization in Operations
14 Support, I think it was 1994, in which case the
15 position, which the title at that time was Technical
16 Support Manager, which McArthur held, which was over
17 RadCon and Chemistry and some other activities, that
18 position was eliminated. Mr. McArthur subsequently
19 ended up the Radiological Controls Manager.

20 A few months afterwards, the position of
21 Chemistry and RadCon Manager was created again,
22 similar to the Technical Support job he had. An
23 individual who really was taking early retirement was
24 put in there on an acting basis. That other
25 individual was in the process of retiring when I took

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1 over the group, so that position became vacant shortly
2 after I took over the group in October of '95.

3 Mr. McArthur raised the question on the
4 basis of, "I held this position, it was eliminated,
5 shortly thereafter it was recreated, and that person
6 put in there on an acting basis, that person is gone.
7 Why wasn't that my job?" As I mentioned before, given
8 a similar circumstance years before and knowing there
9 were rules relating to -- to protect employees so you
10 can't abolish their job today, eliminate them, and
11 turn around next week and recreate their job and toss
12 them out of it, it's sounded like something I needed
13 to refer to HR. I didn't know what the rules were
14 relating to that. I was just under the impression
15 there were some. And that's why I referred it to
16 them, and the issue was raised by Mr. McArthur
17 himself.

18 CHAIRMAN BECHHOEFER: When you referred it
19 to HR, though, did you discuss or comment at all about
20 the merits of one view or another?

21 THE WITNESS: I just explained to them
22 what Mr. McArthur had brought up, and when I talked to
23 Mr. Boyles I told him about my prior impression from
24 before, because the Human Resources Manager who had
25 told me that at this particular time was now Mr.

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1 Boyles' manager, the next level up. So I wanted him
2 to be aware of that so he would talk with his boss
3 about it. And in fact I believe when they made that
4 decision it was his decision. He referred it and
5 consulted with his boss as to whether the decisions he
6 made were correct. But if you're asking, no, I did
7 not talk to him about the relative merits, saying,
8 "Gee, I'd really like you to do this." I just
9 referred it to him because I thought it was a question
10 that needed to be resolved within the Human Resources
11 rules.

12 CHAIRMAN BECHHOEFER: And you've
13 testified, as I understand, that at the time that was
14 after the decision to post the Chemical Manager
15 position was made.

16 THE WITNESS: That's correct; in fact --

17 CHAIRMAN BECHHOEFER: Time-wise.

18 THE WITNESS: Right. Because time-wise
19 Mr. McArthur brought that question up because I had --
20 I don't remember how I communicated to all my managers
21 that basically the decision was that all the new
22 positions would be advertised, including a RadChem
23 Manager.

24 CHAIRMAN BECHHOEFER: I see.

25 THE WITNESS: So some weeks subsequent to

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1 that McArthur came to me with the question.

2 CHAIRMAN BECHHOEFER: Okay. Thank you.

3 JUDGE YOUNG: Yes. I'd like to clarify
4 just a couple of things on which there's been
5 testimony by others that mentioned you. I believe it
6 was Mr. McArthur who testified that you had mentioned
7 Mr. Rogers as a good person to take the place of Mr.
8 Cox for the Selection Review Board for the PWR
9 Chemistry Manager? Does that coincide with your
10 recollection?

11 THE WITNESS: At the time, and I'm coming
12 up with another member, there were a few meetings
13 involving myself, Mr. McArthur and Mr. Boyles, a few
14 discussions in my office. At this time, I don't
15 remember exactly who was there each time. The
16 sequence of events is the first discussion we had is
17 we thought we would try to get the Watts Bar Assistant
18 Plant Manager. McArthur went and attempted to get
19 that individual, and he was not available. We then
20 discussed, and I knew that HR strongly recommended we
21 continue with three people on the Board rather than
22 just two. Our rules would let you drop the two but
23 that's not the preferred way to do it. The discussion
24 to use someone from Corporate, and actually there were
25 two individuals mentioned, Mr. Rogers and a Mrs.

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1 Cooper, I really don't recall whether Mr. McArthur was
2 in there at the time or not in the discussion.

3 JUDGE YOUNG: But your recollection is
4 that you did recommend --

5 THE WITNESS: When we talked about it,
6 yes, I was probably the one who suggested Mr. Rogers
7 and probably another alternate, a Mrs. Cooper, who was
8 also another Corporate manager in the organization.

9 JUDGE YOUNG: And since there has been
10 some testimony about whether Mr. Rogers was an
11 appropriate person, just could you clarify for me the
12 basis for recommending him as one person who might be
13 a good one to sit in that spot?

14 THE WITNESS: Mr. Rogers, by his
15 background. I remember we were looking for a Board
16 member, I believe it was five positions. There were
17 two Chemistry positions, two Radiological Controls and
18 a third position, which was Rad Waste and
19 Environmental Functions. By his background, Mr.
20 Rogers had been what we call a Technical Support
21 Manager at the Plant, and now he had numerous jobs
22 working up to being the Manager of the whole group.
23 But really they provided engineering support to all
24 the systems in the Plant, and knowledge of the effect
25 of maintaining chemistry, maintaining chemical

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1 systems, radiological controls were all items about
2 which he needed to be knowledgeable of. In addition,
3 he was a qualified as a shift tech supervisor, which
4 I also believe the qualifications like that, which are
5 fairly similar to those of a shift senior reactor
6 operator --

7 JUDGE YOUNG: I'm sorry, a shift test --

8 THE WITNESS: a shift technical
9 supervisor.

10 JUDGE YOUNG: Tech supervisor. Thank you.

11 THE WITNESS: In addition to the licensed
12 operators, there's also a requirement for a shift
13 technical supervisor to be on watch, and they have --
14 very generally, their qualifications are similar in a
15 lot of areas, at least the technical knowledge of the
16 Plant, to --

17 JUDGE COLE: Is that the STA advisor,
18 shift technical advisor?

19 THE WITNESS: Yes. Yes. That's right,
20 shift technical advisor. Sorry, I got the acronym
21 mixed up. And given that wide background and I don't
22 remember now how many years experience he had. He had
23 worked at both Sequoyah and Watts Bar. And I just
24 felt that he had a lot of experience and would be
25 appropriate on such a Board.

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1 JUDGE YOUNG: While I'm still on it, I
2 just thought of this one. There's also been some
3 testimony about whether rescheduling would have been
4 an appropriate alternative, given that I think there's
5 some testimony that it was somewhat unusual to go into
6 the evening, as the schedule that remained in place
7 necessitated. Was the option of rescheduling
8 discussed or considered or how is that normally
9 handled, to your knowledge, if you know?

10 THE WITNESS: Well, yes, we did discuss
11 it. Now, it was after -- I don't think I knew at the
12 time that the interviews were not starting until the
13 afternoon. But in using the three site RadChem
14 managers, the original scheduling had been set up to
15 pick a day where all three of them would have been in
16 Chattanooga, and I believe they had a meeting that
17 morning. That was the reason they started later in
18 the day.

19 When Mr. Cox said he could not go, there
20 was only a few days notice. Between -- because we
21 were interviewing for five positions. In addition to
22 the Board, you had those who were being interviewed
23 for all of the positions and in addition some of the
24 HR support people and the like. So it was probably --
25 to reschedule on very short notice would be to go move

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1 12 to 15 people, and there was a concern, "Well, can
2 we even now come up with a date where we can get all
3 the candidates who need to be interviewed there?"

4 JUDGE YOUNG: So you were looking at it as
5 one whole grouping of the five top positions --

6 THE WITNESS: Right. We were looking at
7 it as all --

8 JUDGE YOUNG: -- rather than separating it
9 out.

10 THE WITNESS: That's right. We were
11 looking at it as all five and holding them all
12 together, because the plan was to use the same
13 Selection Review Board for all five positions, and we
14 really only had a few days notice to go change it.
15 And then we tried to go through some substitutes to do
16 it, and that's why we did not reschedule it was the
17 just the logistics of rescheduling that many people on
18 a couple of days notice.

19 JUDGE YOUNG: And I don't recall this,
20 actually, but was there any question raised about the
21 makeup of the Board in that interim period between
22 when Mr. Cox indicated he could not do it and when the
23 interviews were actually held? Was there ever any
24 objection or question raised?

25 THE WITNESS: No, there was no objection

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1 or question raised, except to the extent that Mr.
2 McArthur, Mr. Boyles and I discussed who would be a
3 qualified person to put on the Board. I mean that was
4 the question. No other individuals raised a question
5 relative to the makeup of the Board.

6 JUDGE COLE: And the reason why the
7 meeting started at 12 or after 12 was?

8 THE WITNESS: There was a meeting of what
9 we called the RadChem Managers Peer Team, which was a
10 meeting that was held approximately monthly at one of
11 the sites in which -- at one location. And the three
12 RadChem managers would have to come to Chattanooga in
13 order to do that, and it was actually difficult to get
14 days you could get them all in one place at one time.
15 And so they had a meeting that was scheduled for that
16 morning, and then they were going to go do the
17 interviews.

18 JUDGE COLE: Okay. So your original plan
19 was to use all three RadChem managers.

20 THE WITNESS: That's correct.

21 JUDGE COLE: All right. Thank you.

22 JUDGE YOUNG: The only other thing I
23 wanted to ask you about was there's also been some
24 testimony, and I think it's all been since you first
25 testified, because as I recall you were pretty early

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1 on, about efforts to place Mr. Harvey at Sequoyah as
2 a means of assuring that no one -- none of the three
3 persons, Harvey, Fiser or -- was out of a job.
4 There's been some testimony that that was considered
5 but that you might have suggested or stopped that --
6 stopped Mr. Harvey -- stopped the plans or
7 consideration of any plans to put Mr. Harvey at
8 Sequoyah?

9 THE WITNESS: When that subject came to my
10 attention, the three Chemistry and Environmental
11 Program managers had identical position descriptions.
12 Position descriptions had not indication that they
13 supported any particular plant. When you have three
14 individuals in the same position, there is no way to
15 just take one of those people and move them to another
16 site. We could have pursued moving the entire
17 function to the site, which would have meant moving
18 all three of them. Moving it would have been beyond
19 my authority, but I could have recommended it to the
20 site Vice Presidents to do it, perhaps.

21 But without doing it, you can't -- when
22 you have three identical people, within the rules, you
23 can't just come in and pick one of them and say,
24 "Well, I'm going to move you there." You would have
25 to -- because they're all in the same position

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1 description. The proper way to handle that would be
2 that if Sequoyah had a position, and it's one thing
3 Sequoyah could have done but they elected not to do,
4 would just be to advertise the position. Then any one
5 or all of those three individuals or anyone else could
6 have applied on the position.

7 If any of them had been applied and been
8 selected by Sequoyah, not only would I -- could say,
9 yes, I would have let them go, the only real basis you
10 can have to turn down someone who's been selected, not
11 let them go, is an overwhelming need of the Company to
12 stay where they were. Well, if the position they're
13 in was being eliminated, there's hardly an
14 overwhelming need to the Company to stay there. So
15 had Sequoyah advertised the position, any one or all
16 three of them could have applied on that position and
17 Sequoyah could have selected their best qualified
18 candidate.

19 One impression, though, even that I told
20 you there really wasn't a way to move any one of them.
21 Recognize that even if there were only two left, we
22 would have still had to advertise the position. There
23 was no guarantee that the two remaining Corporate
24 people would be selected. There were people in site
25 jobs who were like Ph.D. chemists who had previously

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1 been in corporate jobs who would have every right to
2 have applied on those positions and potentially could
3 have been still been selected over the remaining two
4 Corporate people.

5 JUDGE YOUNG: Thank you. Anything further
6 or any follow-up?

7 (Judges confer.)

8 MR. MARQUAND: It's TVA 152.

9 CHAIRMAN BECHHOEFER: Mr. McGrath, you
10 were asked certain questions about an incident
11 involving employee harassment and intimidation of Mr.
12 Harvey, and you were asked -- this was based on TVA
13 Exhibit 28. Well, a similar document is TVA Exhibit
14 152, which I understand has been admitted. And you
15 received a copy of that one.

16 MR. DAMBLY: I think the first document is
17 Staff 67.

18 CHAIRMAN BECHHOEFER: Oh. Well, I was
19 referring to TVA 28, which --

20 MR. MARQUAND: Staff 67, Judge, is the
21 same as TVA 28, but TVA 28 is not in the record. We
22 made an attempt yesterday to not throw it in as well
23 --

24 CHAIRMAN BECHHOEFER: Well, we only need
25 one. Of those two, it's clear we only need one.

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1 MR. MARQUAND: Right.

2 CHAIRMAN BECHHOEFER: What would your
3 reaction -- what was your reaction or would your
4 reaction be to the circumstance that Mr. Harvey
5 testified that he never took any sensitivity training
6 course, which was certainly recommended in both of
7 these memos? Would that have -- should that affect
8 the evaluation of Mr. Harvey's suitability for a
9 particular position?

10 THE WITNESS: Excuse me, Your Honor. You
11 said that Mr. Harvey testified that he did not
12 actually take the storage racks? Did you mention
13 that?

14 CHAIRMAN BECHHOEFER: Well, before us, Mr.
15 Harvey said he never took the sensitivity training
16 course that apparently he agreed to take after this
17 incident occurred. He admitted to us that he had
18 taken some file folders from Ms. Landers' office, and
19 he apologized for that.

20 THE WITNESS: And your question was should
21 his failure to have taken the training been considered
22 in the selection process?

23 CHAIRMAN BECHHOEFER: Yes.

24 THE WITNESS: I'll give you two slightly
25 different answers to it. I don't think from looking

1 at the dates on these documents that he was required
2 to have taken the training before the selection.

3 CHAIRMAN BECHHOEFER: No. Yes. There's
4 no date.

5 THE WITNESS: In general, if an employee
6 was required to do something like that and they failed
7 to do that, then that should be taken into
8 consideration in their performance ratings, possible
9 consideration of disciplinary action. And if those
10 actions were taken, they would show up in their
11 performance history which would then be considered in
12 any future job assignment.

13 CHAIRMAN BECHHOEFER: Right. Now, I guess
14 it would be unlikely to have occurred prior to the
15 date of the SRB interviews, which was very shortly
16 after, I guess, this period.

17 THE WITNESS: Yes. Those interviews were
18 sometime in mid-July, I believe.

19 CHAIRMAN BECHHOEFER: Right, right, right.
20 And this one memo was July, one was June, so would an
21 employee who had received such a recommendation be
22 expected to sign up for a course or try to enter a
23 course in that period of time or would that not be --

24 THE WITNESS: It would probably take quite
25 a stroke of luck to find one that was being offered in

1 that short of time period and getting signed up in
2 time to do it. I also recall later when Mr. McArthur
3 discussed this with me that he was aware that Harvey
4 had not yet taken it. Now, this was maybe a couple of
5 months later, but he was expected to take it.

6 CHAIRMAN BECHHOEFER: Okay. Thank you.

7 MR. DAMBLY: If I may ask a question.

8 CHAIRMAN BECHHOEFER: Yes, you may.

9 RECROSS EXAMINATION

10 BY MR. DAMBLY:

11 Q Mr. McGrath, earlier when you were asked,
12 you said the first time you knew about this was when
13 Mr. McArthur told you some two or three months after
14 the selection. If you look at TVA Exhibit 152, dated
15 July 1, which is prior to the selection in '96, you're
16 listed as a cc on that.

17 CHAIRMAN BECHHOEFER: Well, I mentioned
18 that, yes.

19 THE WITNESS: I do not recall ever seeing
20 this document. Now, I may have. It's also quite
21 possible that whenever I went out of town and I
22 believe I was traveling some that month my mail stock
23 gets kind of high and it sometimes took me a long time
24 to get through them. I obviously was on the
25 distribution. I honestly do not recall seeing this

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1 document, but what I remember is the first that I
2 heard of it was Mr. McArthur talking to me about it.

3 MR. MARQUAND: I have one more question.

4 CHAIRMAN BECHHOEFER: Okay.

5 REDIRECT EXAMINATION

6 BY MR. MARQUAND:

7 Q Mr. McGrath, Counsel asked you about TVA
8 Exhibit 28, the June 24 memorandum from -- I'm sorry,
9 Staff Exhibit 67, the June 24, '96 memorandum from
10 Grover to James Boyles, entitled, "Employee Harassment
11 and Intimidation," and you now have before you -- and
12 he pointed out in that a sentence that said, "Mr.
13 Harvey acknowledged these incidents did occur and
14 stated he was unaware of the impact of his behavior
15 towards Ms. Landers." You now have, I believe, before
16 you TVA Exhibit 152, which Mr. Harvey testified about
17 yesterday. And it's his handwritten notes at the
18 bottom. At some point, did you become aware that Mr.
19 Harvey denied those allegations as well as the fact
20 that Dr. McArthur told you that they had not been
21 substantiated?

22 A To be honest with you, at this time all I
23 can remember was what McArthur -- that McArthur told
24 me they weren't substantiated. I don't specifically
25 remember whether he told me that Harvey had denied

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1 them.

2 Q Well, with respect to the questions
3 Counsel asked you about whether it would be
4 appropriate or not to take into consideration the
5 selection process, whether or not a manager had acted
6 inappropriately, insensitively, would it be important
7 to know whether those allegations were proven or
8 whether the individual even denied those allegations?

9 A Yes.

10 MR. MARQUAND: I have nothing further,
11 Your Honors.

12 MR. DAMBLY: Nothing.

13 CHAIRMAN BECHHOEFER: Anything further?

14 MR. DAMBLY: Nothing.

15 MR. MARQUAND: No, Your Honors.

16 CHAIRMAN BECHHOEFER: Mr. McGrath, I guess
17 you're released again.

18 THE WITNESS: Thank you.

19 CHAIRMAN BECHHOEFER: We appreciate your
20 coming up here and appearing before us again.

21 THE WITNESS: All right. Thank you. It
22 was nice to see you all again.

23 MR. MARQUAND: Your Honors, we have Mr.
24 Fogleman here. If we could get started with him this
25 evening, I am fairly confident that we can be done

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1 tomorrow.

2 JUDGE YOUNG: Great.

3 MR. MARQUAND: Could we have five or ten
4 minutes first?

5 JUDGE YOUNG: Ten minutes?

6 CHAIRMAN BECHHOEFER: Ten-minute break.

7 MR. MARQUAND: That would be great.

8 (Whereupon, the foregoing matter went off
9 the record at 4:36 p.m. and went back on
10 the record at 4:54 p.m.)

11 CHAIRMAN BECHHOEFER: Back on the record.

12 Mr. Marquand?

13 MR. MARQUAND: Your Honor, TVA calls Keith
14 Fogleman.

15 CHAIRMAN BECHHOEFER: Mr. Fogleman?

16 Whereupon,

17 H. KEITH FOGLEMAN

18 was called as a witness by counsel for TVA and, having
19 been first duly sworn, was examined and testified as
20 follows:

21 DIRECT EXAMINATION

22 BY MR. MARQUAND:

23 Q State your name, please.

24 A Keith Fogleman.

25 Q Who are you employed by?

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1 A Tennessee Valley Authority.

2 Q For how long?

3 A A little over 24 years.

4 Q What is your current position at TVA?

5 A I'm a senior manager of human resource
6 operations for the chief operating officer
7 organization.

8 Q What are your responsibilities?

9 A My group, which comprises about 46 people,
10 provides the day-to-day HR delivery services, human
11 resource delivery to the nuclear organization, the
12 transmission organization, the river systems
13 environmental group and the fossil power group, as
14 well as the chief operating officer staffs.

15 In that job, we're responsible for, like
16 I said, day-to-day HR operations, which would include
17 administering collective bargaining agreements, would
18 include insuring that, you know, we're following TVA
19 policies and procedures, consulting with the
20 management team on HR issues, assisting employees with
21 HR issues, just generally providing overall HR
22 services.

23 Q Are you the highest-level employee in the
24 human resources organization in the chief operating
25 officer's organization?

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1 A No.

2 Q Who --

3 A Bill Reynolds would be my supervisor.

4 Q He exclusively human resources?

5 A He's non-exclusively human resources.
6 He's human resources, safety, and technical training.

7 Q My question is, are you the most senior or
8 the highest-level human resource employee in the chief
9 operating officer's organization?

10 A Yes.

11 Q What is your educational background?

12 A I have a B.S. degree in industrial
13 technology from East Tennessee State University. And
14 I have one year of night law school.

15 Q Could you give us a brief thumbnail of
16 your experience at TVA?

17 A I came to TVA in 1978 working as a
18 management trainee for the construction organization.
19 Within that training, within that position, I had part
20 of my training included labor relations, which was
21 kind of a mixture of labor relation and some human
22 resource functions. I was in that position when the
23 plant started being deferred.

24 I moved to Bellefonte and continued to
25 function in the labor relations-human resource area,

1 then the Browns Ferry; did some work, continued to do
2 some of the work I've done at Bellefonte and
3 Hartsville; also had some supervisory responsibilities
4 over procedures and a training group; was selected for
5 a labor relations officer in the late '80s; worked at
6 Watts Bar and Sequoyah as a human resource consultant;
7 came in '93 as a labor relations manager and in the
8 corporate office for TVA nuclear and have been labor
9 relations manager, moved to the general manager of
10 human resources in the I believe '99 time frame; and
11 then was selected last June, 2001, for the current
12 position.

13 MR. MARQUAND: We've provided a copy of
14 this document to staff, but I don't believe we entered
15 a TVA Exhibit 142 already.

16 MR. DAMBLY: It's just I think they
17 numbered them ahead of time. And obviously we've gone
18 way past this now, but it hasn't ever been dealt with.

19 (Whereupon, the aforementioned
20 document was marked for
21 identification as TVA Exhibit
22 Number 142.)

23 BY MR. MARQUAND:

24 Q Mr. Fogleman, I've provided you a copy of
25 TVA Exhibit 142. What is that?

1 A It's a copy of my resume.

2 Q As far as it goes, is it accurate and up
3 to date?

4 A Yes.

5 MR. MARQUAND: Your Honors, we tended to
6 you Exhibit 142.

7 MR. DAMBLY: No objection.

8 CHAIRMAN BECHHOEFER: Without objection,
9 TVA 142 will be admitted.

10 (Whereupon, the aforementioned
11 document, having previously
12 been marked for identification
13 as TVA Exhibit Number 142, was
14 received in evidence.)

15 BY MR. MARQUAND:

16 Q There's been a lot of discussion, Mr.
17 Fogleman, about the word "human resources" in this
18 proceeding. What is the concept of human resources in
19 TVA nuclear?

20 A The concept of human resources at TVA, not
21 just TVA nuclear, but -- is that when you look at an
22 organization, you've got your -- in the case of the
23 nuclear organization, you've got your three nuclear
24 sites and that's your physical assets or your
25 generating assets. And then the other big factor in

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1 running an organization is the human asset.

2 In the human resource, the concept or the
3 function is to help the organization maximize the use
4 of the human asset. And that's through compensation
5 schemes, collective bargaining agreements, through,
6 you know, implementing TVA's personnel practices,
7 personnel policies, human resource policies and
8 practices to ensure that we're trying to maximize
9 that, the human asset for TVA and TVA nuclear.

10 Q What functions do the human resources
11 organization perform in TVA nuclear?

12 Q It provides -- first of all, it provides
13 consultation to the management team on issues related
14 to their employees. I mentioned earlier; for example,
15 helping them with things like administering the
16 collective bargaining agreements, with compensation
17 and pay issues, trying to ensure that management team
18 is following the policies and practices of the
19 organization, that we're administering our collective
20 bargaining agreements.

21 Then we've got ownership over some of the
22 policies and procedures in TVA, accountability for
23 those.

24 Q Who has got ownership of personnel records
25 and files?

1 A Human resources.

2 Q What types of functions and processes does
3 human resources have ownership of?

4 A It would have ownership of the performance
5 management processes; of the vacant position and
6 selection processes; reduction process, reduction in
7 force; reinvestment process; responsible for the -- I
8 think I said, the termination processes; generally
9 just our HR processes.

10 CHAIRMAN BECHHOEFER: Did you say
11 "reinvestment?"

12 THE WITNESS: Reinvestment. Yes, sir.

13 CHAIRMAN BECHHOEFER: Of what?

14 THE WITNESS: We currently have a
15 practice. TVA does not reduce anyone in force. So
16 when we have -- we do have situations in the
17 organization where we have surplus employees, either
18 through -- where we have had process improvement, we
19 have reorganized the staff, whatever.

20 And I think you probably -- you know,
21 there has been some discussion probably about services
22 and things like this. This is a very similar type to
23 our former services or employee transition programs.
24 It's just a -- it's a process to allow us to reduce
25 the particular department or organization. Yet, the

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1 employee is not reduced in force. And they have some
2 options about what they want to do. One of those
3 options would be to try to find another position
4 within TVA.

5 BY MR. MARQUAND:

6 Q Is it in the nature of -- you are right.
7 We have already heard testimony about employee
8 transition program and TVA services. Reinvestment, is
9 it in the nature of a successor program to those
10 programs?

11 A It would be considered a successor
12 program. Some of the things we learned from those
13 programs we applied into this program.

14 Q We've talked about the functions a human
15 resources organization performs. What functional
16 areas in the human resources area do you have
17 experience in?

18 A I've been responsible for labor relations,
19 compensation, for staffing, recruiting, the -- some
20 safety -- I've had some safety responsibilities and
21 some training and development responsibilities.

22 Q Have you had responsibilities to interact
23 with the corporate HR organizations in TVA?

24 A Yes. If you kind of look at how TVA is
25 structured, we have a corporate HR organization that

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1 reports to the executive vice president of human
2 resources. And that organization provides us our
3 policies and our procedures and our programs.

4 My organization, which is part of the line
5 management organization, essentially takes those
6 policies and procedures and is responsible for
7 implementing and assisting line managers implement
8 these policies and procedures in the line
9 organization.

10 JUDGE YOUNG: Before you go on from that,
11 there has been some testimony, I think, if I
12 understood it correctly, -- correct me if I am wrong
13 -- that some of the corporate HR people assist
14 managers in selection, processes, and reorganizations,
15 and so forth. Is that different than what they -- I
16 didn't understand the distinction there.

17 MR. MARQUAND: I think there is a
18 distinction.

19 BY MR. MARQUAND:

20 Q Can you explain to the panel the
21 distinction between corporate TVA versus corporate TVA
22 nuclear and how those different HR organizations fit
23 in?

24 A The corporate TVA organization is strictly
25 responsible for policy and procedure.

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1 JUDGE YOUNG: Are you talking about your

2 --

3 BY MR. MARQUAND:

4 Q Don't say "HR" but corporate. What's
5 corporate? When we are saying "corporate TVA," what
6 do we mean?

7 A Corporate TVA. That would be the big TVA,
8 all of TVA now. When you're talking --

9 JUDGE YOUNG: And that's where you are?

10 THE WITNESS: No, ma'am. I'm --

11 JUDGE YOUNG: You're under operations?

12 THE WITNESS: I'm under operations, the
13 chief operating officer's organization, which includes
14 the nuclear organization, the fossil organization, the
15 river systems and environmental organization, and the
16 transmission and power supply organization.

17 All the generation and transmission
18 organizations report to the chief operating officer.
19 The executive vice president of human resources would
20 be one of his peers. And that person is responsible
21 for the corporate human resource organization that
22 provides policies, procedures, programmatic direction
23 for TVA.

24 Now, within my organization, which is a
25 line HR organization, line management HR organization,

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1 I have people stationed at site locations. For
2 example, I have people stationed at Sequoyah, Watts
3 Bar, and Browns Ferry nuclear sites.

4 And then I have also people who are still
5 day-to-day implementers stationed in the corporate
6 office. And they provide support to the corporate --

7 BY MR. MARQUAND:

8 Q Corporate COO.

9 A Corporate COO organization.

10 JUDGE YOUNG: So would that be people like
11 Ed Boyles and Ben Easley? They would be under your
12 site?

13 THE WITNESS: Yes, ma'am. Yes, ma'am.

14 JUDGE YOUNG: Okay. That explains it
15 better.

16 MR. MARQUAND: Sure.

17 BY MR. MARQUAND:

18 Q We are using the word "corporate" in two
19 different senses, Mr. Fogleman. TVA's head is a
20 three-member board of directors, correct?

21 A Correct.

22 Q And the COO, or the chief operating
23 officer, operations is one organization that reports
24 to the board?

25 A Yes.

1 Q Now, there are other organizations that
2 report to the board as well, correct?

3 A That's right.

4 Q And you said the corporate HR is one of
5 those?

6 A That's correct.

7 Q And there are other administrative
8 organizations that report to the board as well, right?

9 A Chief financial officer, administrative
10 functions. There's some other TVA offices that report
11 there.

12 Q The general counsel?

13 A The general counsel.

14 Q The inspector general? The overall
15 administrative offices that report generally for all
16 of TVA report to the board, correct?

17 A That's correct.

18 Q And that's where the corporate HR is
19 versus the HR for the chief operating officer?

20 A Correct.

21 Q Now, distinguish the overall corporate HR
22 organization from the corporate COO's HR organization.

23 A Okay. Small staff in the corporate human
24 resource function in Knoxville that -- the board of
25 directors. They are responsible for our human

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1 resource information system, the programs and policies
2 outlining our compensation and performance management
3 systems, and other types of programmatic
4 responsibilities.

5 The corporate human resources within the
6 COO, or the chief operating officer's, organization
7 would be line HR people reporting to me that provide
8 day-to-day service to the corporate -- to primarily
9 the Chattanooga corporate offices when they provide
10 day-to-day HR service.

11 Q Let's further confuse matters and refer
12 back to '96. There wasn't a chief operating officer
13 at that time, was there?

14 A No, there wasn't.

15 Q There was a chief nuclear officer, right?

16 A That's correct.

17 Q Was there a human resource function in the
18 nuclear organization?

19 A Yes, there was. And at that time, we had
20 HR people at three sites in Chattanooga in the
21 corporate office.

22 Q And that was referred to as a corporate
23 TVA nuclear office, wasn't it?

24 A That's correct.

25 Q That's where you were at that time?

1 A In '96, I was labor relations manager in
2 the corporate office.

3 Q Of nuclear?

4 A Of nuclear.

5 Q All right. Now, you've mentioned
6 reductions in force being one process owned by HR and
7 that you said you had experience in it. I would like
8 to discuss that. Have you had any experience in
9 conducting reductions in force?

10 A Yes, I have. That is the first round of
11 experience that I had with this was in the early '80s
12 at the Hartsville nuclear construction site.

13 Q Right. And Hartsville was intended to be
14 what?

15 A It was intended to be a four-unit BWR
16 nuclear plant.

17 Q A rather large one, then, right?

18 A Right.

19 Q So tell us about your experience there.

20 A The plant was deferred in the early '80s,
21 I believe about the '83 time frame, '82 time frame.
22 And we had a substantial workforce of construction
23 employees who at that given time in TVA were TVA
24 employees. And we were responsible for -- I was
25 responsible for doing the reductions of the traits in

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1 labor employees with construction employees at the
2 nuclear -- at the construction site.

3 Q What did you do with respect to carrying
4 out those reductions in force?

5 A My role -- I had some assistance from our
6 office on site. They helped me get the retention
7 registers together, but -- and do some of the
8 recordkeeping for me. But essentially I was
9 responsible for 3,000-plus construction workers: to
10 prepare reduction-in-force notices; to get the notices
11 delivered to the employee; get the rights, appeal
12 rights, anything like that, that they had that was
13 involved in that process; get the management team
14 prepared to understand what the process was going to
15 be, how it was going to be; prepared them with
16 understanding of what we were doing, what our rules
17 and regulations were; and then essentially went
18 through the process of removing those employees from
19 the site.

20 Q About 3,000?

21 A In the neighborhood of 3,000, yes.

22 Q Have you had any other experiences in
23 conducting reductions in force?

24 A When I went to --

25 Q About how many times?

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1 A About how many times? Probably in the
2 neighborhood of I'll say ten times probably.

3 Q Can you tell us the next situation you had
4 to conduct a reduction of force?

5 A When I went to Bellefonte, we had a
6 similar situation that we did at Hartsville.
7 Bellefonte was a construction project. And it was
8 also deferred. And we had a substantial amount of
9 trades and labor employees or construction workers
10 that had to be reduced in force.

11 And I did virtually the same function I
12 did at Hartsville, coordinate that reduction in force
13 and the letters and the retention registers. Again,
14 the employment office at Bellefonte helped me with
15 that.

16 Q In the various other reductions in force
17 that you conducted, have you had other different types
18 of responsibilities?

19 A When I was a human resource officer at
20 both Watts Bar and Sequoyah, I was -- would take -- I
21 actually did the RIF along with the administrative
22 people supporting me.

23 We established the retention registers,
24 developed letters, prepared managers with their
25 talking points, got the letters together. And then

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1 after the letters were issued, we also put the appeal
2 packages together.

3 Q What do you mean "appeal package"?

4 A Part of the RIF process, they have appeal
5 rights to the Merit Systems Protection Board. So when
6 those appeals would come forth, we developed the
7 package that would go back to the Merit Systems
8 Protection Board.

9 Q About how many employees over the years
10 have you had personal experience in reducing the
11 force?

12 A Hartsville and Bellefonte was probably
13 close to 5,000 employees between those two sites. And
14 then Watts Bar, Sequoyah, some of my responsibilities
15 as labor relations manager overseeing as a labor
16 relation officer helping conduct RIFs, I'm going to
17 guess in the neighborhood of seven to eight thousand.

18 Q How many of these individual reductions in
19 force have you been involved in defending?

20 JUDGE YOUNG: By "defending," do you mean
21 when there has been an appeal?

22 MR. MARQUAND: Some sort of an appeal.

23 THE WITNESS: To put a specific number on
24 that, I don't know that I -- I can't. It's -- when
25 you look at the grievances, the EEO complaints, and

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1 the number of Merit Systems Protection Board appeals
2 that we have had, more than -- I am going to say more
3 than 100 and possibly hundreds but more than 100.

4 BY MR. MARQUAND:

5 Q You mentioned three separate processes.
6 Can you explain how those three processes evolve:
7 grievances, EEO appeals, MSPB? Why are they involved
8 in RIFs?

9 A Well, first of all, when an employee
10 receives a reduction-in-force notice, by the fact that
11 they're a federal employee, they have rights to appeal
12 it to the Merit Systems Protection Board. So that's
13 where they come in to play.

14 Now, the other part -- the other two
15 appeal processes, if the -- if a person feels like
16 they have been discriminated for age, race, sex, so
17 on, so forth, then they can utilize the EEO process to
18 file an appeal.

19 And the other one, the grievance process,
20 75 percent of the employees in TVA are covered under
21 a collective bargaining agreement. So if they feel
22 like they have been treated unfairly, under those
23 collective bargaining agreements, they have rights to
24 file grievances. And so we have had appeals through
25 the years in all three of those venues.

1 Q What has been your involvement in
2 defending those various RIFs in those various forums?

3 A Well, I mentioned a little earlier that I
4 had -- when we had appeals to the Merit Systems
5 Protection Board, there was an initial package that is
6 required to go back that outlines TVA's position and
7 some -- and the supporting documentation. So I was
8 involved at Watts Bar and Sequoyah putting those
9 packages together.

10 Then also at -- from Hartsville,
11 Bellefonte, and Sequoyah, Watts Bar, I participated in
12 the hearings that occurred as a result of those
13 appeals.

14 In the EEO process, I have also been a
15 witness in the early stages. Let me start over. In
16 the early stages, I work with the counselors as
17 they're working with employees and management to try
18 to resolve the complaint and then later serve as a
19 witness and also assist the Office of General Counsel
20 in their preparation for the cases.

21 And then in the grievance process, then
22 the lead person responsible for defending the
23 grievance action, which includes trying to mediate it,
24 work out -- work a resolution out in the early stages,
25 and represent management up through step three of the

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1 process, and then assist our labor relations function,
2 our corporate TVA labor relations staff, when the
3 cases went to arbitration.

4 Q You mentioned that 75 percent of TVA
5 employees were covered by collective bargaining
6 agreements. Are management specialist employees
7 covered under collective bargaining agreements?

8 A No. That's the 25 percent that's --
9 that's not. We have some excluded administrative
10 employees that are not covered by --

11 Q Are different rules or different
12 procedures applied to management specialist employees
13 in conducting RIFs?

14 A No. We use the same process.

15 Q Same process. What formal or informal
16 training have you had in conducting reductions in
17 force?

18 A Formal training has been minimal. I
19 received -- as we were starting the process at
20 Hartsville back in the early '80s, the Office of
21 General Counsel came down and helped us transition on
22 the process and how we were supposed to go through it
23 and explained the details of the -- you know, of TVA's
24 policies and practices on the reductions in force.

25 Then I have also -- when we went through

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1 initially, I mentioned that we didn't put the -- I
2 would put the appeal package together when a person
3 filed an appeal to the Merit Systems Protection Board.
4 And there was some training in that process, what
5 should be included in that package that would go back
6 to the Merit Systems Protection Board.

7 Other than that, the training that -- my
8 training has basically been on-the-job training,
9 working through the different issues and problems that
10 you run into in going through one of these processes,
11 working with our Office of General Counsel, our
12 programmatic policy people in HR, and, you know,
13 trying to understand what the -- what our regulations
14 are and how we need to be applying them to the
15 employees in TVA.

16 Q You mentioned on-the-job training. How do
17 you apply or how do you use decisions you receive from
18 Merit Systems Protection Board?

19 A Well, we use them two ways. If they're
20 positive decisions, then that kind of affirms that the
21 process that we have been using is reasonable,
22 workable, follows the standards.

23 If it's not, if we've got unfavorable
24 decisions, then we need to readjust our approach. And
25 we have not always had 100 percent positive decisions

1 from the Merit Systems Protection Board. And it has
2 caused the organizations that I have supported and TVA
3 to adjust its practices.

4 Q Have you had any training from the Office
5 of Personnel Management, or OPM, in conducting
6 reductions in force?

7 A No.

8 Q Have you consulted the OPM regulations in
9 order to conduct reductions in force?

10 A From my -- to conduct a -- to actually do
11 the reduction in force, what I have relied on through
12 the years is TVA has had it spelled out about -- TVA's
13 policies for doing the RIF was spelled out. TVA had
14 a procedure for how it was to be conducted. And
15 that's what i've used to typically conduct a RIF. You
16 know, in our -- it's my understanding that TVA's
17 policies and procedures are an interpretation of
18 Office of Personnel Management regulations.

19 JUDGE YOUNG: They go into greater detail
20 than OPM or do you know?

21 THE WITNESS: I don't know that I could
22 make that judgment whether they are in grater detail.
23 It's TVA policies, procedures.

24 BY MR. MARQUAND:

25 Q Mr. Fogleman, I'm going to show you Joint

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1 Exhibit 65.

2 JUDGE YOUNG: That's already in evidence,
3 I think.

4 BY MR. MARQUAND:

5 Q Mr. Fogleman, what is Joint Exhibit 65?

6 A It's --

7 MR. MARQUAND: Does everyone have Joint
8 Exhibit 65?

9 BY MR. MARQUAND:

10 Q Mr. Fogleman, what is Joint Exhibit 65?

11 A It's a copy of TVA's personnel manual.
12 Reduction at Section 7 covers reductions in force and
13 layoff dated May 6, 1987. And it's the --

14 Q Is it familiar to you?

15 A Yeah I've used this document several
16 times through the years.

17 Q Is that the document you said you consult
18 in order to conduct reductions in force?

19 A Yes.

20 Q So back to my last question. Do you
21 routinely consult or have you consulted OPM
22 regulations to conduct reductions in force or is it
23 Joint Exhibit 65, TVA personnel manual?

24 A I've always used the TVA personnel manual
25 to conduct a reduction in force.

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1 Q What is your understanding of how the
2 procedures are set forth in that personnel manual with
3 their interpretation of or with their implementation
4 of?

5 A It's an implementation of the OPM
6 regulations. As a matter of fact, I think in here
7 somewhere it says that.

8 Q But is it, as you said, "enlightened by
9 TVA's experience in this precedent with the MSPB
10 appeals"?

11 A Yes. We have -- as a matter of fact, on
12 Page 12, it talks about that, the OPM regulations.
13 And this is TVA's interpretation of the understanding
14 of what the OPM regulations are. And, you know,
15 through the years, as, you know, we have had hearings
16 and decisions, when necessary, we have adjusted these
17 guidelines.

18 Q Let's talk about --

19 CHAIRMAN BECHHOEFER: Has OPM ever
20 reviewed or approved these procedures, to your
21 knowledge?

22 THE WITNESS: I don't know.

23 MR. MARQUAND: I believe that happens,
24 Your Honor. In individual MSPB appeals, they look to
25 see whether or not TVA has followed what MSPB looks

1 at, which is the ultimately 5 Code of Federal
2 Regulations. And if TVA is wrong, then they set it
3 aside.

4 CHAIRMAN BECHHOEFER: I was focusing more
5 on whether these were, for instance, submitted to OPM
6 for review prior to being put into effect.

7 MR. MARQUAND: I'm not aware of any such
8 requirement, nor am I aware that it has ever been
9 done.

10 CHAIRMAN BECHHOEFER: Okay. Thank you.

11 BY MR. MARQUAND:

12 Q I'm going to now show you TVA Exhibit 125,
13 which is entitled "Supervisor's Handbook."

14 JUDGE YOUNG: TVA 125?

15 MR. MARQUAND: Yes, Your Honor.

16 (Whereupon, the aforementioned
17 document was marked for
18 identification as TVA Exhibit
19 Number 125.)

20 BY MR. MARQUAND:

21 Q Mr. Fogleman, what is TVA Exhibit 125?

22 A This is a copy of the supervisor's
23 handbook put out by Tennessee Valley Authority dated
24 October 1st, 1990.

25 Q And it covers a number of subjects. I

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1 note on Page FG2, it's got a table of contents. And
2 specifically there's a section that says on Page 87
3 for reductions of force.

4 A That's correct.

5 Q What force and effect, if any, does this
6 supervisor's handbook have?

7 A Well, what the supervisor's handbook was
8 developed was to give our managers a tool that
9 outlined generally how we would conduct business in
10 the world of human resources.

11 It talks about a variety of topics ranging
12 all the way from, you know, the equal employment
13 opportunity process down to restoration rights. And
14 it was developed to be a tool that our managers could
15 use as they got into different situations, you know,
16 whether it be pay, leave, retirement issues,
17 discipline issues, reduction, appeals, and grievances.

18 And it's a compilation of things from
19 collective bargaining agreements, from TVA's
20 practices, policies, procedures. You know, it's a
21 compilation of a lot of human resource stuff into one
22 document.

23 Q It explains things to supervisors?

24 A It explains things for supervisors.

25 Q As between this and the personnel manual,

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1 which is Joint Exhibit 65, which does human resources
2 use in conducting various matters, specifically
3 reductions in force?

4 A Well, if you're going to do -- you've got
5 to go back to your -- in this case, it was a personnel
6 manual, human resource procedures. That's what we're
7 going to use in human resources.

8 Q Let's talk about reductions in force.
9 What are the reasons that management could have to
10 conduct a RIF?

11 MR. MARQUAND: First, Your Honors, I would
12 like to tender TVA Exhibit 125 into evidence.

13 MR. DAMBLY: No objection.

14 CHAIRMAN BECHHOEFER: Without objection,
15 TVA 125 will be admitted.

16 (Whereupon, the aforementioned
17 document, having previously
18 been marked for identification
19 as TVA Exhibit Number 125, was
20 received in evidence.)

21 BY MR. MARQUAND:

22 Q Mr. Fogleman, back to my question. What
23 are the reasons management might have to conduct a
24 reduction in force?

25 JUDGE YOUNG: Did you have time to stamp

1 this?

2 THE WITNESS: I'm sorry. Your question?

3 BY MR. MARQUAND:

4 Q What reasons might management have to
5 conduct a reduction in force?

6 A Lack of work, a reorganization, lack of
7 funds. Those would be the three primary. There's
8 some things in there about people having reassignment
9 rights and reclassifications and things like that, but
10 the three predominant reasons that you're going to
11 find is lack of work, reorganization, and lack of
12 funds.

13 Q When we talk about reorganization, what
14 kinds of things might drive a reorganization?

15 A Several things I think could drive a
16 reorganization. When you -- reorganizations are done
17 because the function of the organization work has
18 changed. And so it could be technology process was
19 improved, technology improved. It could be that the
20 function of the workgroup changes or is changing.

21 It could be that part of the
22 reorganization is also part of a reduction effort and
23 that the department only has -- will have less people
24 to do the job. So to get -- to continue the work,
25 they need to assess how they're going to do that,

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1 which may also cause a reorganization putting
2 functions together, things like that.

3 Q Can there sometimes be more than one
4 reason to conduct a RIF?

5 A Well, oftentimes -- I mentioned just a
6 moment ago that three primary reasons are usually lack
7 of funds, a lack of work, or reorganization. And
8 usually those three things are -- many times those
9 three things or at least two of the three are tied
10 together.

11 Q Give us some examples of how that might
12 happen.

13 A Well, an organization benchmarks the
14 industry and finds out that the rest of the industry
15 or the top performers in the industry are performing
16 work in a manner different than TVA is performing it.

17 So what would happen is come back and
18 analyze the way we're doing work and decide that we
19 can do it cheaper and more efficiently if we would
20 adjust our processes.

21 Process improvement results in lack of
22 work. And also the process improvement determines
23 that we have adjusted the way we do work. So we have
24 reorganized our work. And at the same time, we have
25 a lack of work or less work for individuals in that

1 organization.

2 Q Did the completion of the restart, say, of
3 Sequoyah and Browns Ferry or the completion of
4 construction at Watts Bar result in reductions in
5 force? And if so, how?

6 A Well, look at TVA during that time frame.
7 We had both Brown Ferry and Sequoyah that were not
8 operating and was in the process of trying to start up
9 Watts Bar. And so our organization was a
10 predominantly construction-focused, recovery-focused
11 organization.

12 We had a lot of people supporting those
13 recovery efforts as well as that start-up effort at
14 Watts Bar. We had people who had that specific
15 start-up skills. And we were focusing on starting
16 plants.

17 As '96 approached, you know, we at that --
18 by that time, we had the -- the Browns Ferry and
19 Sequoyah units were recovered. And we were in the
20 midst of starting up Watts Bar.

21 And so the organization was changing from
22 an organization that had been focused on plant
23 recovery and plant start-up to an organization that
24 was focusing on operating and maintaining the plants.

25 And so during that time, we were looking

1 at that the organization's functions were going to be
2 changing. The structures in some cases were going to
3 be changing because we were shifting from an
4 organization, shifting the role from the organization
5 from start-up, recovery to operating and maintenance.
6 And some of the functions of an organization would be
7 different there in those roles.

8 Q Give the panel an idea of change in the
9 size and magnitude of the TVA workforce. At one point
10 you were at Hartsville. When TVA had Hartsville under
11 construction, you also mentioned Bellefonte.

12 JUDGE YOUNG: Excuse me. Mr. Dambly had
13 mentioned that he needed to go at 5:45. And it is
14 getting close to that. So you might want to start
15 winding up this line of questioning.

16 MR. MARQUAND: Let me finish this
17 question, and I'll be done.

18 JUDGE YOUNG: Okay.

19 BY MR. MARQUAND:

20 Q During that time frame back in the '80s,
21 when Hartsville was under construction, Bellefonte was
22 under construction, other nuclear facilities were
23 under construction, TVA had construction forces, about
24 how many TVA employees were there?

25 A When I came to TVA in 1978, that's when we

1 had Yellow Creek, Bellefonte, Hartsville, Phipps Bend
2 under construction. Browns Ferry was operating.
3 Sequoyah I think we had a unit operating. And Watts
4 Bar was under construction. There was over 50,000
5 employees in TVA.

6 Q And today how many TVA employees are
7 there?

8 A There's 13,000 TVA employees.

9 Q So there's been a substantial reduction?

10 A Substantial reduction, yes.

11 Q Not only reductions but change I assume,
12 since we're no longer talking about construction
13 change in the skill sets of the employees who are
14 still at TVA?

15 A Yes. It's an -- when I came to work in
16 1978, it was an organization that was heavily
17 engineering-focused and construction-focused and it's
18 a -- we still have a lot of engineering, but it's
19 engineering focused towards operating and maintaining
20 plants.

21 Q What about construction? Does TVA have
22 construction employees?

23 A TVA doesn't have construction employees.
24 When we're going through our outages and doing
25 modifications, the restart of Browns Ferry Unit I will

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1 be done by contractors.

2 MR. MARQUAND: I think that would be a
3 good place to break, Your Honors. Thank you.

4 JUDGE YOUNG: Okay. See you tomorrow
5 morning.

6 MR. MARQUAND: Thank you, Your Honors.

7 CHAIRMAN BECHHOEFER: We'll be back at
8 9:00 o'clock tomorrow. Parties, don't forget that
9 once we get through, we want to check on documents
10 that maybe should be in the record but haven't been
11 formally offered.

12 MS. EUCHNER: And also, Your Honor, I
13 think we need to double check. I don't know how your
14 lists were made, but I went through your lists. And
15 I found stuff that we had as admitted that wasn't on
16 your list as admitted. I don't know whether you just
17 did it from the front pages of the transcripts.

18 JUDGE COLE: I think that's probably how
19 it was done.

20 CHAIRMAN BECHHOEFER: I think for the most
21 part, that's how it was done.

22 MS. EUCHNER: So we may actually have to
23 go back and check the transcripts themselves to see if
24 some of these were admitted.

25 CHAIRMAN BECHHOEFER: Before we close the

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1 record, we want to make sure that the documents that
2 are admitted or have been admitted or should be
3 admitted are there.

4 JUDGE COLE: Particularly the ones you
5 want to use.

6 CHAIRMAN BECHHOEFER: Yes, yes.

7 JUDGE YOUNG: Yes. And I think it would
8 be useful. Mr. Marquand, Mr. Slater, I think it would
9 be useful. We talked yesterday about how we would
10 take documents out that were not proffered.

11 And I think it would be useful for counsel
12 to take part in that because you said you could just
13 make a list and have someone else do it, but we have
14 each got a set. There are three other sets. And it
15 might go quicker. And then you could be absolutely
16 sure that you have had everything taken out that has
17 not been proffered if we just divide them up and go
18 through them.

19 So counsel might want to plan to stay
20 after we have released Mr. Fogleman tomorrow and see
21 if we can all get on the same page.

22 JUDGE COLE: Yes. But would that provide
23 enough time to make sure that the record has been
24 checked so that the documents that are supposed to be
25 in evidence are, in fact, identified as being in

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1 evidence?

2 MR. MARQUAND: We're going to have to do
3 that, too.

4 MS. EUCHNER: Well, we can check that. I
5 mean, I have already, in part, checked it all. Just
6 go back and find the ones that I didn't see on your
7 list and check the transcripts. So if we already have
8 our lists and know which ones we think we were not on
9 the master list that you provided us, that should take
10 very little time.

11 JUDGE YOUNG: Another thing. I've got
12 this computer here now. And so I've got the whole
13 transcript up through whenever Mac put it on there.
14 So as we go through taking them out, if we get to an
15 exhibit, we're not sure if it's admitted, I could just
16 do a search for Exhibit Number X, Y, Z, or whatever,
17 find out, and then as we go through them -- now, that
18 will only be updated through possibly our June
19 setting, but, still, we know what has happened since
20 Monday, we hope.

21 CHAIRMAN BECHHOEFER: We'll adjourn for
22 the day.

23 (Whereupon, at 5:46 p.m., the foregoing
24 matter was recessed, to reconvene at 9:00
25 a.m. on Thursday, September 12, 2002.)

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CERTIFICATE

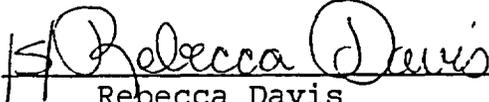
This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:

Name of Proceeding: Tennessee Valley Authority
Watts Bar Nuclear Plant,
Unit 1 Sequoyah Nuclear
Plant, Units 1 and 2 Browns
Ferry Nuclear Plant, Units
1,2,3

Docket Number: 50-390-CivP; ASLBP No: 01-
791-01-CivP

Location: Rockville, Maryland

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.


Rebecca Davis
Official Reporter
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