

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

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

TENNESSEE VALLEY AUTHORITY'S MEMORANDUM ON THE
ADMISSIBILITY OF DEPOSITIONS

This memorandum addresses the admissibility of depositions under Rule 32(a)(2) of the Federal Rules of Civil Procedure. The law places the burden of establishing that the requirements of Rule 32 have been met squarely on the shoulders of the offeror of a deposition. 7 Moore's § 32.02[1][b]; *Alleger v. United States*, 909 F.2d 869, 876 (6th Cir. 1990); *Rascon v. Hardiman*, 803 F.2d 269, 277 (7th Cir. 1986). This is so because the common law rule prefers live testimony over a deposition. 7 Moore's Federal Practice 3d, § 32.02[1][a] (2002).

Rule 32 provides for the deposition of "a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rules 30(b)(6) or 31(a) to testify" to be used by an adverse party for any purpose. In this case it is clear that TVA and not Mr. McGrath is a party to this proceeding. Furthermore, he is neither an officer or director of TVA nor was he designated under Rules 30(b)(6) or 31(a) to testify on TVA's behalf. The sole question is whether he was a "managing agent" at the time of his deposition. *Reed Paper Co. v. Procter & Gamble*, 144 F.R.D. 2 (D. Me. 1992). See also *Rubin v. General Tire and*

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TVA EXH. 112

SECY-02

CLEAR REGULATORY COMMISSION

Docket No. 50-390 Official Est. No. TVA 112

In the matter of TVA

Staff _____ IDENTIFIED

Applicant RECEIVED 9/13

Intervenor _____ REJECTED _____

Other _____ WITHDRAWN _____

DATE 4/30/02 Witness _____

Clerk BHM

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USNRC



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ADJUDICATIONS STAFF

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Rubber Co., 18 F.R.D. 51, 56 (S.D.N.Y. 1955); *In re Honda American Motor Co.*, 168 F.R.D. 535, 540 (D. Md. 1996); *Boston Diagnostics Development Corp. v. Kollsman Mfg. Co.*, 123 F.R.D. 415, 416-17 (D. Mass. 1988); *Petition of Manor Investment Co.*, 43 F.R.D. 299, 300-01 (SDNY 1967). At the time of Mr. McGrath's deposition, he no longer worked in TVA's Nuclear Power organization. Instead, he worked in a separate non-nuclear division of TVA. Under those circumstances he was not "at the time of his deposition" authorized to speak for TVA Nuclear and his deposition would be inadmissible under Rule 32(a)(2). *Reed Paper Co.* 144 F.R.D. at 5 ("It being clear that Hughes was not employed by the corporate defendant in this case at the time of the taking of his deposition, there is no occasion to determine whether or not he was, in fact, a managing agent."). Second, he was not a "managing agent" as required by the Rule. "The question then becomes whether [he] is invested with general powers to exercise [his] discretion and judgment in dealing with corporate matters," . . . "the fact that a person fails to qualify as one exercising general powers involving the exercise of discretion and judgment with respect to corporate matters is of great significance in determining whether that person should be permitted to bind the corporation in deposition by testimony." *Reed Paper Co.* 144 F.R.D. at 5,6. While Mr. McGrath was the Acting Manager of Operations Support within TVA's Nuclear Power organization he did not have general authority to legally bind the organization. As stated by the Court *Reed Paper Co.*:

[W]here there is question about *the existence of an agency relationship* of the kind required by the Rule, that question is the foundational question to be resolved in determining whether or not, under the Rule's language, the corporation should be bound in deposition by the testimony of the employee. It is apparent to the Court that the theory of the provision in the Rule is that the corporation may properly and fairly be treated as bound by statements of a person who is authorized to act for the corporation with general powers involving the exercise of discretion and judgment in respect to corporate affairs. The theory is one of "a speaking agency." The requirement of general powers is intended to assure that the scope of the authority granted to the employee in question may fairly be taken to be broad enough to contemplate that the employee

may speak for the corporation in doing business on behalf of the corporation. If this theory is correct, and I believe it to be, then it is of fundamental importance that there be an agency relationship between the corporation to be deposed and the employee to be utilized to speak for the corporation in the deposition, and that the agency relationship be of sufficient breadth to justify the conclusion that the corporation may fairly be bound by what the agent says in respect to his management of corporate affairs [144 F.R.D. at 7 n. 4].

Under the circumstances here, Mr. McGrath's deposition is not admissible under Rule 32(a)(2) since at the time of his deposition he was not a "managing agent" of TVA's Nuclear Power organization.

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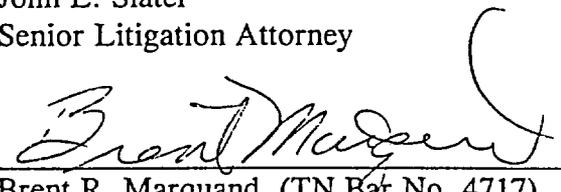
Respectfully submitted,

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