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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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)	)	

BRIEF IN SUPPORT OF TENNESSEE VALLEY AUTHORITY'S MOTION IN LIMINE

On March 29, 2002, pursuant to paragraph 5 of the Board's January 30, 2002, third prehearing conference order, Tennessee Valley Authority (TVA) and the Nuclear Regulatory Commission (NRC) Staff filed their respective witness and exhibit lists for the scheduled April 23, 2002, hearing. TVA has now filed a motion in limine to preclude the Staff from calling two TVA attorneys, Edward J. Vigluicci and Brent R. Marquand, as witnesses and to exclude certain exhibits listed by the NRC Staff. In addition, pursuant to 10 C.F.R. § 2.713, TVA's motion requests that the Board confirm that Mr. Marquand's continued representation of TVA in this proceeding is consistent with pertinent ethical considerations.

A. Witnesses

In its witness list, the Staff names Mr. Vigluicci and Mr. Marquand as potential witnesses. Both Vigluicci and Marquand are attorneys employed in TVA's Office of General Counsel. Mr. Marquand is lead counsel for TVA in this proceeding

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and also represented TVA with respect to Mr. Fiser's 1993 and 1996 DOL complaints. Both Mr. Vigluicci and Mr. Marquand have represented TVA in the earlier matters in this proceeding, including the 1998-99 investigation by the NRC's Office of Investigations, the November 22, 1999, predecisional enforcement conference (PEC) for Mr. McGrath and Dr. McArthur, and TVA's December 10, 1999, PEC. Thus, the Staff has known since at least 1998 that Mr. Marquand and Mr. Vigluicci were representing TVA in this matter.

On August 3, 2001, TVA served interrogatories which requested the Staff to identify, among other things, "each individual with knowledge or information on which the NRC staff will rely in this case" and to note "those individuals the NRC staff intends to call as witnesses at the hearing" (interrogatory No. 29). The Staff's September 4, 2001, answer indicated that it intended to rely on the "individuals interviewed by DOL, OI, and TVA-OIG," which did not include Mr. Vigluicci or Mr. Marquand, but declined to more specifically identify the individuals it intended to call as witnesses.[1] On December 21, 2002, TVA served a second set of interrogatories which again requested the Staff to identify each individual with knowledge or information upon whom the Staff intended to rely and the individuals the Staff intended to call as witnesses (interrogatory No. 18). The Staff's January 22, 2002, answers to interrogatories indicated only that the Staff intended to rely on the persons deposed by the Staff and Mr. Fiser and Ronald C. Grover. Once again the Staff declined to identify Mr. Marquand or Mr. Vigluicci as persons with any knowledge or information pertinent to the case or as potential witnesses. Instead, the Staff waited until March 29, nearly the eve of trial, to inform TVA that it may wish to call Mr. Marquand or Mr. Vigluicci as witnesses.

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1 TVA's interrogatories and the Staff's responses have previously been filed in this proceeding.

The matters about which the Staff claims it intends to seek testimony from Mr. Vigluicci and Mr. Marquand are not in dispute and may be established by other witnesses or even by stipulation. Further, the Staff has misstated both Mr. Vigluicci's and Mr. Marquand's involvement. Counsel for the NRC Staff, as Federal attorneys, have a duty to the Board to be straightforward and candid in presenting their arguments. We think that their statements in support of seeking Mr. Vigluicci's and Mr. Marquand's testimony seriously stretch that duty.

1. **Mr. Vigluicci**. As the basis for naming Vigluicci as a potential witness, the NRC Staff states that, "[i]n a discussion with counsel for Staff, Vigluicci represented that he had drafted a response to the letter Senator Sasser sent to TVA regarding a letter sent to him by Gary Fiser, William Jocher, and D. R. Matthews" (WL at 8).[2] To the contrary, Vigluicci made no such representation either to Dennis C. Dambly or Jennifer M. Euchner (Vigluicci decl. ¶ 2). Nor did Vigluicci draft, prepare, review, or comment on any response to Senator Sasser's letter (Vigluicci decl. ¶ 2).

On August 24, 1993, Senator Jim Sasser sent a letter to William L. Hinshaw, II, TVA's then Inspector General, requesting him to look into Fiser's Jocher's, and Matthews' "concerns about management practices and the corrective action process at the Tennessee Valley Authority" (Hickman decl. ex. A). As shown by the declaration of G. Donald Hickman, TVA's Acting Inspector General, the Office of Inspector General (OIG) sent a response to Senator Sasser on September 9 1993, with supplemental responses on October 22, 1993, and April 22, 1994 (Hickman decl. exs. B-D). Those responses were prepared and reviewed by the OIG. Because TVA's Inspector General reports to Congress and the TVA Board of Directors and is statutorily independent of other TVA organizations, the responses were not coordinated

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2 TVA will cite to the Staff's witness list as "WL."

with TVA's Office of General Counsel, or with any other department within TVA (Hickman decl. ¶ 4). Nor did Mr. Vigluicci play any role in drafting or preparing those responses (Hickman decl. ¶ 4; Vigluicci decl. ¶¶ 2, 3).

The Staff's statement about the scope of Mr. Vigluicci's proposed testimony is based on a distortion of the facts. Mr. Vigluicci remarked to Staff counsel, Dambley and Euchner, that he is responsible for reviewing responses to congressional inquiries directed to TVA's Nuclear organization (Vigluicci decl. ¶ 4). At no time during their conversation, however, did Mr. Vigluicci indicate that he was responsible for preparing or reviewing any of the OIG's responses to the Sasser letter (Vigluicci decl. ¶ 4). There is no evidence that TVA's Nuclear organization ever sent a response to the August 24, 1993, letter from Senator Sasser or that Mr. Vigluicci assisted in the preparation/review of that nonexistent response.

Therefore, contrary to the NRC Staff's representation to the Board, Mr. Vigluicci does not have "testimony relevant to TVA's response to the issues raised in that letter and relevant to Fiser's protected activities, including what individuals he contacted to obtain the information required to respond to Senator Sasser's request" (WL at 8). Because he had no involvement in responding to the Sasser inquiry, Mr. Vigluicci did not obtain any information or contact any individual relevant to any issues in this proceeding (Vigluicci decl. ¶ 5). Other than to harass Mr. Vigluicci and to create difficulties for TVA unrelated to the pertinent issues in this proceeding, Mr. Vigluicci's proposed testimony is irrelevant and inadmissible and should be excluded pursuant to Rule 402 of the Federal Rules of Evidence.

Mr. Vigluicci is due to be excluded for another reason. Because he did not prepare/review any of the OIG's responses to Senator Sasser's letter, Mr. Vigluicci lacks the requisite personal knowledge to testify about any of the matters surrounding the preparation of those responses. Consequently, under Rules 601 and 602,

Fed. R. Evid., his proposed testimony is inadmissible and must be excluded on this additional basis.

2. **Mr. Marquand**. The NRC Staff seeks the testimony of Mr. Marquand in two different respects. First, referring to the earlier enforcement conferences, the NRC Staff asserts that Mr. Marquand "stated that he made the decision that the settlement of Gary Fiser's DOL 1993 complaint did not entitle him to transfer into the PWR Chemistry position" and was "one of the relevant decision makers in the determination to post the position rather than transfer Fiser into it without competition" (WL at 4). This representation by NRC Staff is a distortion of a matter that has never even been subject to dispute.

As made clear by the transcript of the November 22, 1999, PEC between the NRC and Thomas McGrath, TVA's Nuclear Human Resources (HR) "had made the decision to post the chemistry positions." At that point Fiser informed HR that he had filed a previous DOL complaint, that as a result of the settlement he had been placed in his position, and that if HR posted the new position, he would file a second DOL complaint. HR then stopped the process, contacted the Labor Relations Staff, which in turn contacted Mr. Marquand in TVA's Office of General Counsel to discuss the settlement and how to proceed. Nov. 22, 1999 tr. at 41-2.

There is no dispute as to Mr. Marquand's legal advice and that it was disclosed to NRC's OI long ago. TVA's OIG investigated the allegations of Fiser's complaint nearly two years before NRC's OI. During that investigation, the OIG interviewed Katherine J. Welch, a labor relations specialist in TVA Nuclear. When Fiser threatened to file a DOL complaint in 1996, she sought legal advice from Mr. Marquand. The sequence of events and the legal advice she received is set forth in the OIG's record of interview of Ms. Welch.[3] Her interview was disclosed to OI

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3 The OIG's record of interview of Ms. Welch is attached hereto.

during its investigation and again disclosed to the Staff during discovery. To the extent Mr. Marquand's legal advice is relevant, it may be stipulated, Ms. Welch's record of interview can be placed in the record, or she can testify. There is simply no need to call Mr. Marquand, TVA's lead attorney in this proceeding, to testify about this matter which is beyond dispute.

Mr. Marquand has previously informed the Staff of the nature of his legal advice, and it is wholly consistent with Ms. Welch's record of interview. At McGrath's November 23, 1999, PEC, Mr. Marquand stated that he was asked "whether or not the previous settlement agreement guaranteed [Fiser] a new position" or "a position for life." He advised Labor Relations that the settlement agreement did not do either, but "specifies a specific job [Fiser] was to be placed in." Mr. Marquand also indicated that he was informed that after being placed in the position specified in the settlement agreement, Fiser "had applied and been selected for a new position." When asked if Fiser had a "right as a result of the settlement agreement to a new position," Mr. Marquand indicated that he did not, that there was "no guarantee of a position for life." Mr. Marquand's last advice was to "post the position and to proceed with the selection without regard to whether he filed the previous DOL complaint." Nov. 22, 1999, tr. at 43-44.

One of the key issues in this proceeding is whether the incumbent of an existing position has a right under Office of Personnel Management (OPM) regulations, 5 C.F.R. pt. 351, to transfer into a new position or whether it must be posted for competition. Contrary to the Staff's assertion that Mr. Marquand "was one of the relevant decision makers in the determination to post the position rather than transfer Fiser into it without competition," TVA's Nuclear HR had already decided that those positions should be posted. Mr. Marquand had no involvement in that determination, and no one has ever indicated that he was the person, or one of the persons, who made the decision to post the chemistry positions. Rather, as indicated at the PEC,

Marquand gave requested legal advice on a different issue—whether Fiser's settlement agreement gave him a legal right to a job.

TVA waived its attorney-client privilege as to the legal advice given by Mr. Marquand about Mr. Fiser's rights under his settlement agreement. Indeed, TVA is willing to stipulate that such advice was given to TVA management and further stipulate to that portion of the transcript of the McGrath's PEC and Ms. Welch's record of interview, setting forth Mr. Marquand's advice, as a joint exhibit in this proceeding. However, the appropriate person to testify on this point is the recipient of that advice, not counsel for TVA. Mr. Marquand's testimony would be unnecessary, redundant, and cumulative. There is no reason for Staff's request for Mr. Marquand's testimony on this point other than to harass and to distract counsel for TVA from its preparation for the hearing in this case. The Board should deny this request.

Second, the NRC Staff seeks Marquand's testimony because he allegedly provided Wilson McArthur "a transcript of Fiser's [surreptitious] tape recorded conversations to read" and makes the naked assertion that that "poisoned the well for Fiser in future employment at TVA" (WL at 5). Once again, the Staff is seeking to call TVA counsel as a witness on a matter which is not subject to dispute. It is undisputed that Dr. McArthur was informed that Fiser was making surreptitious tape recordings.[4] It is also undisputed that the only legal advice with respect to the tapes received by Dr. McArthur was "to be sensitive of the fact that you're being recorded" (Dec. 13, 2001, dep. at 57). The issue is not whether Dr. McArthur was informed of

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4 Dr. McArthur informed the Staff quite candidly that he "was advised that he [Fiser] was taping our conversations" (Nov. 22, 1999, PEC, tr. at 47). Although, Dr. McArthur indicated that he had heard "some of the tapes" and "did see some transcripts," "it was very hard to understand and the transcriptions were not-nothing came out of any particular interest, from what I recall" (Nov. 22, 1999, PEC at 48). However, when Staff showed Dr. McArthur the purported "transcript" of the tapes prepared by Fiser (the only "transcript" of Fiser's tapes we were aware of at that time), he testified that was not what he had seen (Dec. 13, 2001, dep. at 58-60).

surreptitious tape recordings, shown transcripts, or listened to the tapes. Rather, the question is whether any adverse action was taken against Fiser because of his conduct in making the tapes. TVA counsel cannot add anything relevant to that issue, and the Staff's attempt to call Mr. Marquand as a witness can only be viewed as an attempt to embarrass and harass.

3. The Board should confirm that Mr. Marquand may continue his representation of TVA consistent with all ethical considerations and the Code of Professional Conduct. The Staff's attempt to call Mr. Marquand as a witness raises the ethical consideration of whether he should continue as counsel of record for TVA in this proceeding. As shown by Mr. Marquand's declaration, he is an attorney in good standing, having been admitted to practice before the Supreme Court of Tennessee, the United States District Courts for the Eastern and Western Districts of Tennessee, the United States Courts of Appeals for the Fifth, Sixth, Tenth, and Eleventh Circuits, and the United States Supreme Court. As discussed above, the matters as to which the Staff seeks to have him testify relate solely to uncontested matters. Further, as shown by Mr. Marquand's declaration he has fully disclosed to TVA management the matters as to which the Staff is seeking his testimony and management is of the opinion that his withdrawal from representation would work a substantial hardship on TVA because of his distinctive value in this particular proceeding. Moreover, TVA management has requested that Mr. Marquand continue to represent TVA in this proceeding. Finally, Mr. Marquand is of the opinion that the matters as to which Staff proposes to have him testify will not be prejudicial to TVA (Marquand decl. ¶ 5).

Tennessee Disciplinary Rule 5-102 adopted by the Tennessee Supreme Court in Rule 8 provides:

> **DR 5-102. Withdrawal as Counsel When the Lawyer Becomes a Witness.** - (A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a lawyer in the lawyer's firm ought to be called as a witness on behalf of the client, the lawyer shall withdraw from the

conduct of the trial and the firm, if any, shall not continue representation in the trial, except that the lawyer may continue the representation and the lawyer or a lawyer in the lawyer's firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a lawyer in the lawyer's firm may be called as a witness other than on behalf of the client, the lawyer may continue the representation until it is apparent that the testimony is or may be prejudicial to the client.

In this case, since the Staff proposes to call Mr. Marquand as a witness, the pertinent rule is DR 5-102 (B). Because the matters as to which the Staff proposes to have him testify will not be prejudicial to TVA, that rule allows him to continue his representation. Even under DR 5-102 (A), Mr. Marquand may continue his representation of TVA because this situation falls within the circumstances enumerated in DR 5-101(B)(1) and (4). That rule provides:

DR 5-101. Refusing Employment When the Interests of the Lawyer May Impair the Lawyer's Independent Professional Judgment. - (A) Except with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests.

(B) A lawyer shall not accept employment in contemplated or pending litigation if the lawyer knows or it is obvious that the lawyer or a lawyer in the lawyer's firm ought to be called as a witness, except that the lawyer may undertake the employment and the lawyer or a lawyer in the lawyer's firm may testify:

(1) If the testimony will relate solely to an uncontested matter.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or the lawyer's firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or the lawyer's firm as counsel in the particular case.

As previously discussed, Mr. Marquand's proposed testimony relates solely to uncontested matters and therefore falls within DR 5-101 (B)(1). Further, because of his long involvement with this case and knowledge of this area of the law, TVA management has requested that he continue his representation because his withdrawal from this proceeding would work a substantial hardship on TVA. This allows him to continue his representation consistent with DR 5-101 (B)(4). With the Staff's knowledge, Mr. Marquand has been representing TVA in this proceeding for about four years and the case is now less than three weeks away from hearing. There is no question that Mr. Marquand's familiarity with the TVA organization, the intricacies of federal personnel and whistleblower law, the TVA personnel system, and the witnesses and circumstances of this case, gives him a distinctive value not replaceable elsewhere, the loss of which would work a substantial hardship on TVA. *Aetna Casualty & Sur. Co. v. United States*, 570 F.2d 1197, 1202 (4th Cir.), *cert. denied*, 434 U.S. 821 (1978) (motion to disqualify Government attorney from representing individuals denied where "such representation is highly desirable since these defendants will have the benefit not only of Government counsel but also the reservoir of the Government's expertise in this highly involved and technical litigation, and will be spared the burden upon their time and resources incident to the employment of independent counsel"). Disqualification "is a drastic measure which courts should hesitate to impose except when absolutely necessary" (*Freeman v. Chicago Musical Instrument Co.*, 689 F.2d at 715, 721 (7th Cir. 982)). *Accord Board of Educ. v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979). As the Second Circuit, which has considered and ruled upon numerous disqualification issues, noted in *Government of India v. Cook Indus., Inc.*, 569 F.2d 737, 739 (1978):

> A client whose attorney is disqualified incurs a loss of time and money in being compelled to retain new counsel who in turn have to become familiar with the prior comprehensive investigation which is the core of modern complex litigation. The client moreover may lose the benefit of its longtime counsel's specialized knowledge of its operations.

It is thus understandable that numerous courts have warned that "motions to disqualify are often disguised attempts to divest opposing parties of their counsel of choice" (*Kalmanovitz v. G. Heileman Brewing Co.*, 610 F. Supp 1319, 1323 (D. Del. 1985)), and that "[t]he attempt by an opposing party to disqualify the other side's lawyer must be viewed as a part of the tactics of an adversary proceeding" (*J.P. Foley & Co. v. Vanderbilt*, 523 F.2d 1357, 1360 (2d Cir. 1975)).

The party who attempts to disqualify opposing counsel bears the burden of proof in that regard. *Munk v. Goldome Nat'l Corp.*, 697 F. Supp. 784, 787 (S.D.N.Y. 1988). And such motions "are not favored" (*Mitts & Merrill, Inc. v. Shred Pax Corp.*, 112 F.R.D. 349, 353 (N.D. Ill. 1986)). This is particularly so when the motion is filed on the eve of trial, for which counsel for TVA has been preparing for years. *See, e.g.*, *United States v. Newman*, 534 F. Supp. 1113, 1127 (S.D.N.Y. 1982), *aff'd*, 722 F.2d 729 (2d Cir.), *cert. denied*, 464 U.S. 683 (1983). The timing here of the Staff's listing of Mr. Marquand as a potential witness makes clear their purely tactical ploy. They absolutely failed to disclose during discovery that they considered that Mr. Marquand's involvement in the development of this case might even make him a witness.

In light of the above circumstances and authorities and pursuant to 10 C.F.R. § 2713, TVA's motion requests that the Board confirm that Mr. Marquand may continue his representation of TVA in this proceeding consistent with all ethical constraints and with DR 5-101 and 5-102.

B. Exhibits

1. Staff Exhibit Nos. 51 and 52 and other transcripts prepared by the Staff of conversations recorded by Gary Fiser. As discussed earlier, Fiser made surreptitious tape recordings in the workplace of various employees. Copies of those tapes were provided to TVA's OIG. When exhibit lists were due to be

exchanged and long after discovery closed, the Staff informed TVA that it supposedly had the tapes enhanced, transcribed to compact discs (CD), and was having transcripts prepared. To date, the Staff has provided CDs of only three of the conversations and "transcripts" of two of the three conversations. Like the tapes, the CDs are largely inaudible—not even Fiser who obviously was closest to the recorder is clear. The transcripts are worse—they are neither accurate nor complete. They are replete with lengthy omissions noted as "(inaudible)" and a cursory examination of the CDs shows that other portions of the "transcripts" are incomplete or are inaccurate. Under those circumstances, neither the CDs nor the transcripts are inadmissible in evidence.

The leading case in this regard is *United States v. Robinson*, 707 F.2d 872 (6th Cir. 1983). In that case, the court held that the trial court abused its discretion in admitting inaccurate tapes and transcripts. *Robinson* articulated the standard by which the trial court must determine the admissibility of tape recordings.

> That discretion presumes, as a prerequisite to admission, that the tapes be authentic, accurate and trustworthy. Moreover, they must be audible and sufficiently comprehensible for the jury to consider the contents. Recordings will be deemed inadmissible if the 'unintelligible portions are so substantial as to render the recording as a whole untrustworthy' [970 F.2d at 876; citations omitted].

Following *Robinson*, the court in *United States v. Segines*, 17 F.3d 847, 854 (6th Cir. 1994), rejected the use of transcripts offered by the government over objection by opposing counsel, holding that "[w]hen tapes are unintelligible, however, a transcript intended as an aid to the jury inevitably becomes, in the minds of the jurors, the evidence itself." The court there concluded that it was a "manifest abuse of discretion" for the trial court to have allowed use of which transcripts the trial court noted were inaccurate (17 F.3d at 855). Further, where the parties cannot stipulate to the accuracy of transcripts, they may only be used if the trial court confirms the accuracy of the transcripts against the recordings. *United States v. Scarborough*, 43 F.3d 1021, 1024 (6th Cir. 1994). Here, even a cursory review of the recordings

shows that the unintelligible portions of the CDs are so substantial as to render the recording untrustworthy. Further, a comparison of the CDs with the "transcripts" shows that they are not accurate transcriptions of the recordings. Under those circumstances, neither the CDs nor the "transcripts" should be allowed into evidence.[5]

2. Exhibit Nos. 182, 187, and 189, grievance, selection, and reduction-in-force policies. The Staff has listed "Grievance Arguments" as potential exhibit No. 182. That document relates to the classification of certain TVA positions which are subject to a collective bargaining agreement for represented positions. The positions that Fiser held and the position he sought were all on TVA's management and specialist schedule which is not subject to any collective bargaining agreement. The standards applicable to positions in the bargaining unit are simply irrelevant to the positions at issue in this proceeding and the exhibit should be excluded.

The Staff has listed a TVA policy for employment selection of "outside candidates" issued May 1997 as potential exhibit No. 187, and "updated" reduction-in-force (RIF) instructions dated May 1997 as potential exhibit No. 189. Both documents were issued after the events at issue in this proceeding and were simply not in effect at the time. The pertinent selection policies and RIF guidelines which were in effect are available for use as exhibits. TVA's policy on selection of "outside candidates" is doubly irrelevant since neither Fiser nor the person who was selected were "outside candidates."

Based on the foregoing reasons and the authorities cited herein, the Board should strike Mr. Vigluicci and Mr. Marquand from the Staff's witness list and not allow the exhibits noted. Further, the Board should confirm that Mr. Marquand's

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[5] To date, we have only received CDs of two conversations together with the "transcripts" prepared by the Staff. Given the lateness of their production, we object to the burden of making such comparisons of any other conversations which the Staff may later deem to produce on the eve of trial.

representation of TVA is consistent with all ethical considerations and, in particular, DRS-101 and 5-102.

Respectfully submitted,

April 5, 2002

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TENNESSEE VALLEY AUTHORITY
Office of the Inspector General
RECORD OF INTERVIEW

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Position: Federal Appeals Specialist
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Chattanooga, Tennessee
Work Tel.: 751-3954
Residence: [redacted]

Home Tel.:
SSN/DOB:

Welch was contacted at her office, advised of the identity of the interviewing agent, and interviewed concerning a Department of Labor (DOL) complaint filed by Gary L. Fiser. In his complaint, Fiser alleges that TVA recently posted the job they offered him as settlement to a previous complaint in 1994. Welch was interviewed and furnished the following information.

Welch advised during June 1996, she was contacted by Ben Easley, Corporate Human Resource Officer, who told her that an employee by the name of Gary Fiser had raised a concern about the posting of his position. Fiser claimed that TVA is violating a settlement agreement between Fiser and TVA. Fiser claimed that TVA is illegally posting his position, a position that was given to him in a previous DOL settlement agreement. Fiser alleged that if TVA posted this position, he would file another DOL complaint.

Welch said she reviewed the previous DOL settlement agreement between Fiser and TVA and could find nothing in the agreement which guaranteed Fiser a position at TVA for any length of time. Welch then contacted Brent Marquand, Attorney, Office of the General Counsel (OGC), and asked him to also review the settlement agreement. Marquand reviewed the settlement agreement and concurred there was nothing in the settlement agreement guaranteeing Fiser his position, and TVA should go ahead and post the position.

(Continued)

Investigation On: July 29, 1996 At: Chattanooga, Tennessee (Telephonic)

By: SSA David V. VanBockern:JCH File: 2D-169 -14

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Welch said after getting an opinion from OGC; she advised Easley of her finding. To her knowledge, Easley then went ahead and posted the position.

DVV:JCH

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing motion in limine (with attached declarations and excerpts from the PEC conferences and from Dr. McArthur's deposition), proposed order, and supporting brief have been served by overnight messenger on the Board members and NRC Staff and by regular mail on the other persons listed below. Copies of the motion, proposed order, and brief, less the attachments which are being sent either by overnight or regular mail, have also been sent by e-mail to those persons listed below with e-mail addresses.

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This 5th day of April, 2002.

Attorney for TVA