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Docket Number: 50-391-OL

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

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TELECONFERENCE

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IN THE MATTER OF: : Docket No.
TENNESSEE VALLEY AUTHORITY, : 50-391-OL
(Watts Bar Nuclear Power : ASLBP No.
Plant - Unit 2) : 09-893-01-OL-BD01

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Tuesday, December 22, 2009

BEFORE:

LAWRENCE G. McDADE Chairman
PAUL B. ABRAMSON Administrative Judge
GARY S. ARNOLD Administrative Judge

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APPEARANCES:

On Behalf of the U.S. Nuclear Regulatory

Commission:

JEREMY SUTTENBERG, ESQ.

CHRISTINE JOCHIM BOOTE, ESQ.

SUSAN UTTAL, ESQ.

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P R O C E E D I N G S

(3:00 p.m.)

1
2
3 CHAIRMAN McDADE: We are here in the
4 matter of the Tennessee Valley Authority, Watts Bar
5 Unit 2. This is ASLBP Number 09-893-01-OL. This is
6 Lawrence McDade. With me here are Judge Arnold and
7 Judge Abramson.

8 Is the NRC staff on the line?

9 MR. SUTTENBERG: Yes.

10 CHAIRMAN McDADE: And would you please
11 identify yourselves please?

12 MR. SUTTENBERG: Jeremy Suttенberg, and
13 that's spelled S-U-T-T-E-N-B-E-R-G.

14 CHAIRMAN McDADE: And, Mr. Suttенberg, who
15 is with you for the NRC staff?

16 MS. UTTAL: This is Susan Uttal. I'm with
17 OGC. My last name is U-T-T-A-L.

18 CHAIRMAN McDADE: And who else?

19 MS. JOCHIM BOOTE: Christine Jochim Boote.
20 That's two last names. Jochim is J-O-C-H-I'M and
21 Boote is B-O-O-T-E. I'm also with OGC.

22 CHAIRMAN McDADE: And who else?

23 MR. MILANO: Patrick Milano, M-I-L-A-N-O
24 and I'm with the Office of Nuclear Reactor Regulation.

25 CHAIRMAN McDADE: I believe that's all for

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1 the NRC staff. Am I correct?

2 MR. SUTTENBERG: That's correct.

3 CHAIRMAN McDADE: For the Applicant, Ms.
4 Sutton, Mr. Bessette?

5 MR. BESSETTE: Yes, Your Honor, this is
6 Paul Bessette, B-as in boy-E-S-S-E-T-T-E with Morgan,
7 Lewis. And we have Kathryn Sutton, S-U-T-T-O-N, also
8 with Morgan, Lewis.

9 CHAIRMAN McDADE: And there are also
10 direct representatives of TVA on the line?

11 MR. VIGLIUCCI: Yes, there are. This is
12 Edward Vigluicci, that's V-as in Victor-I-G-L-U-I-C-C-
13 I.

14 MR. CHANDLER: And Christopher Chandler,
15 C-H-A-N-D-L-E-R.

16 CHAIRMAN McDADE: And for the Southern
17 Alliance for Clean Energy?

18 MS. CURRAN: This is Diane Curran, C-U-R-
19 R-A-N.

20 CHAIRMAN McDADE: And is there anybody
21 else on the line who has not yet identified
22 themselves?

23 MS. CURRAN: There is no one else for
24 SACE.

25 CHAIRMAN McDADE: Let's get started then.

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1 I would ask that when you speak up that you state your /
2 name so that the Court Reporter is able to identify
3 the statement with the correct person.

4 I don't anticipate this is going to take
5 very long this afternoon. I certainly hope not.

6 The first issue we have has to do with the
7 scheduling and I want to address a question to the NRC
8 staff. As far as your best estimate as to when the
9 environmental impact statement and safety evaluation
10 report, the final, will be published.

11 MR. SUTTENBERG: This is Jeremy
12 Suttenger. We expect that the draft EIS will be
13 published in September 2010. And then we expect that
14 the final EIS will be published in January 2011. And
15 we also expect that the last supplement to the SER
16 will be published around January 2011.

17 CHAIRMAN McDADE: Okay. So the draft,
18 September of 2010, the final, January of 2011,
19 relatively short period of time before that. Am I
20 correct that from the standpoint of all of the
21 participants here that we could not go to a hearing
22 prior to the issuance of the environmental impact
23 statement? Is there any objection to that? Basically
24 what I'm asking is there anyone who believes that we
25 would be able to go to a hearing on this prior to the

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1 filing of the environmental impact statement?

2 (No response.)

3 CHAIRMAN McDADE: Apparently no.

4 Let me ask to TVA, the contentions that
5 were admitted in this particular cases both appear to
6 be contentions of omission. Is it the intent of the
7 TVA to endeavor to correct the alleged deficiencies or
8 is it the intent of the TVA to litigate it based on
9 the contentions as submitted?

10 MR. BESSETTE: Your Honor, we're still
11 developing a strategy. But we would hope to at least
12 cure one of them through supplying the necessary
13 information. And with regard to the broader one, the
14 environmental aquatic issue, we're just developing our
15 strategy currently.

16 CHAIRMAN McDADE: When do you think you
17 would have that developed? And, again, please
18 identify yourself on the line.

19 MR. BESSETTE: I'm sorry. This was Paul
20 Bessette, Your Honor.

21 With regard to one of the contentions, we
22 have some outstanding questions from the NRC on one of
23 them. So we would be hoping to have that strategy
24 addressed within the next 30 to 60 days. And also we
25 would be -- have a strategy on the second aquatics

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1 contention in about that same time frame.

2 CHAIRMAN McDADE: Okay. What I would like
3 to do then is to schedule another status conference.
4 What I would like you to do is within 60 days, and
5 just to be on the safe side, within 90 days if you
6 would please notify the Board what the status of those
7 are, whether or not it is your intent to, again,
8 attempt to correct the alleged deficiencies on the two
9 contentions or whether, or not it is your intent to
10 litigate either or both of them as they are currently
11 articulated and admitted.

12 The next has to do with discovery. I was
13 very pleased to see that the parties were able to
14 enter into an agreement with regard to the mandatory
15 discovery. And the initial phase of the mandatory
16 discovery should be complete by January the 15th
17 pursuant to the agreement. Is that agreement working
18 to the satisfaction of the parties? And at this point
19 in time, do you believe that the January 15th date
20 remains realistic?

21 First, the NRC staff.

22 MR. SUTTENBERG: Yes, we -- the agreement
23 is working to our satisfaction. And we will be able
24 to meet the January 15th date.

25 CHAIRMAN McDADE: Okay. From Morgan,

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1 Lewis?

2 MR. BESSETTE: Yes, Your Honor, we do
3 appreciate the cooperation of all the parties -- this
4 is Paul Bessette again -- on this agreement. And
5 although we are in the beginning phases of it, we have
6 not encountered any challenges or problems. And we do
7 expect to meet the January 15th date also.

8 CHAIRMAN McDADE: And Ms. Curran?

9 MS. CURRAN: This is Diane Curran. SACE
10 also expects to meet the January 15th deadline and
11 we're satisfied with the agreement.

12 CHAIRMAN McDADE: If at some point in
13 time, and we hope that it will not happen, but if at
14 some point in time it appears that the agreement is
15 not working to the satisfaction of the parties, we
16 would ask you to notify the Board, the party that
17 believes that it is not working satisfactorily, so
18 that we would be able to resolve any problems that
19 might arise.

20 Next what I'd like to do is discuss the
21 nature of the procedure. At this point we are
22 proceeding on the assumption that this is going to be
23 litigated, if litigated, under Subpart L. There is
24 also a possibility that it could be Subpart G or
25 Subpart N. And we wanted to raise that with the

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1 parties.

2 We believe at this point that it would be
3 premature to file a motion with regard to proceeding
4 under Subpart G because at this point the mandatory
5 disclosures have not been completed nor do you know
6 the names of the witnesses that the other parties are
7 going to be calling. So, therefore, I think it would
8 not be possible to make out an appropriate motion.

9 Are there any of the parties who are
10 present that believe that statement is incorrect or
11 believe that a decision should be made to Subpart L
12 versus Subpart G at this time?

13 From NRC staff?

14 MR. SUTTENBERG: No.

15 MR. BESSETTE: Your Honor, this is Paul
16 Bessette from Morgan, Lewis. We agree. At this
17 point, it is also premature.

18 CHAIRMAN McDADE: And from Southern
19 Alliance, Ms. Curran?

20 MS. CURRAN: We agree it is premature.

21 CHAIRMAN McDADE: And I didn't catch the
22 name of the individual from the NRC staff.

23 MR. SUTTENBERG: This is Jeremy
24 Sutttenberg.

25 CHAIRMAN McDADE: And you also agree that

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1 it is premature at this point?

2 MR. SUTTENBERG: Yes, we agree that it is
3 premature.

4 CHAIRMAN McDADE: At this point, do any of
5 the parties believe that a Subpart N proceeding would
6 be more appropriate than a Subpart L?

7 For the NRC staff?

8 MR. SUTTENBERG: At this moment we do not
9 believe that. Jeremy Sutttenberg.

10 CHAIRMAN McDADE: From Morgan, Lewis?

11 MR. BESSETTE: Your Honor, this is Paul
12 Bessette. Because we haven't developed the actual
13 strategy, we believe that is a bit premature. But we
14 certainly -- we would consider that moving forward.

15 CHAIRMAN McDADE: And from Southern
16 Alliance for Clean Energy?

17 MS. CURRAN: We also agree it is
18 premature.

19 CHAIRMAN McDADE: Okay. If it is
20 premature now, what I would say is that within 60 days
21 after the mandatory disclosures are completed -- in
22 other words, within 60 days after January 15 -- if the
23 parties believe that we should proceed under Subpart
24 N on one or both of the contentions, that they would
25 file a joint submission to the Board to so advise.

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1 And questions about that from the NRC
2 staff?

3 MR. SUTTENBERG: Jeremy Suttenger, no
4 questions.

5 CHAIRMAN McDADE: Morgan, Lewis?

6 MR. BESSETTE: Paul Bessette, no
7 questions, Your Honor.

8 CHAIRMAN McDADE: Southern Alliance?

9 MS. CURRAN: Judge McDade, will you be
10 memorializing this in an order?

11 CHAIRMAN McDADE: The answer is I doubt
12 it. We do have a transcript. The transcript is going
13 to be very short so I had not anticipated issuing it
14 in an order. What we're saying should be very clear
15 from the transcript.

16 MS. CURRAN: Okay.

17 CHAIRMAN McDADE: Okay. Are there -- at
18 this point, what I would like to do is to put you on
19 hold for a moment and confer with Judge Arnold and
20 Judge Abramson to see if there are other matters that
21 they wish to take up at this time.

22 While we have you on mute, if perhaps you
23 could also discuss among yourselves whether or not
24 there are other things that you wish to take up at
25 this time. We'll just be off the line for no more

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1 than a minute.

2 (Whereupon, the foregoing matter went
3 off the record at 3:10 p.m. and went
4 back on the record at 3:12 p.m.)

5 CHAIRMAN McDADE: This is Lawrence McDade
6 again.

7 Ms. Curran, are you still on the line?

8 MS. CURRAN: Yes, I am.

9 CHAIRMAN McDADE: Mr. Bessette, Ms.
10 Sutton?

11 MR. BESSETTE: We're here.

12 CHAIRMAN McDADE: And the NRC staff?

13 MR. SUTTENBERG: We're here.

14 CHAIRMAN McDADE: Okay. At this point, we
15 don't have anything else specifically that we want to
16 cover. I would refer you, however, to page three of
17 our order. And just ask that you take those matters
18 into consideration, seeing whether or not there are,
19 you know, as mandatory discovery is completed, whether
20 or not there are opportunities for stipulations,
21 whether or not there are opportunities for narrowing
22 the issues in this particular case.

23 What I would propose to do is to schedule
24 another status conference probably about two weeks
25 after the mandatory discovery -- mandatory disclosures

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1 should be completed. So sometime about the beginning
2 of February to see if there is anything further that
3 needs to be taken up at that time.

4 We will also, after that telephone
5 conference, issue a scheduling order. At this point,
6 it is somewhat premature, in my view, to issue a
7 scheduling order since everything hinges on when the
8 environmental impact statement will be issued, which
9 is now, you know, approximately a year away.

10 When we have that conference, what I would
11 be looking for from the parties is their input on,
12 first of all, when any motions for summary disposition
13 should be filed in this particular case. I want to
14 avoid having summary disposition motions filed at the
15 last moment.

16 As we get towards the time for the
17 hearing, the filing of the summary disposition,
18 particularly in a Subpart L proceedings tends to delay
19 rather than expedite the proceeding. So, therefore,
20 after the mandatory discovery is completed, we would
21 want the parties to be taking into consideration the
22 timing for any motions for summary disposition and
23 whether or not those motions could be handled prior to
24 the issuance of the environmental impact statement.

25 From the standpoint of Southern Alliance

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1 for Clean Energy, Ms. Curran, is there anything
2 further that you think we should handle at this
3 particular conference? Any issues that you wish to
4 raise?

5 MS. CURRAN: Nothing. No issue that I
6 want to raise. First, I do appreciate your concern
7 about the timing of the motions for summary judgment
8 because that can sometimes adversely effect the
9 ability of interveners to prepare their main case. So
10 that is much appreciated.

11 And also I just wanted to let you know
12 that SACE is contemplating submitting a waiver
13 petition to the Board sometime in early January
14 relating to the issue of need for power and cost of
15 energy alternatives.

16 CHAIRMAN McDADE: All right.

17 From the standpoint of Morgan, Lewis for
18 TVA, anything further that we need to handle at this
19 conference?

20 MR. BESSETTE: Just a point of
21 clarification, Your Honor. This is Paul Bessette.
22 You know our initial disclosures are due on January
23 15th but as the agreement between the parties
24 indicates, we do expect that there will be necessity
25 for supplemental disclosures.

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1 And also, in the initial disclosures,
2 because we may not have the exact strategy planned
3 out, we may not have our witnesses listed. So I do
4 think if maybe even after the initial disclosures, it
5 might be a bit premature for the parties to submit
6 within 60 days of January 15th a request for Subpart
7 G and Subpart F. So I would just hope there would be
8 some flexibility on that. That would allow for any of
9 those -- I just wanted to make sure that you
10 understood that there would be additional disclosures
11 ongoing.

12 CHAIRMAN McDADE: No, I anticipate based
13 on the agreement that you have that those would be
14 continuing at least through the publication of the
15 environmental impact statement and safety evaluation
16 report.

17 But I also would anticipate that the vast
18 majority of the mandatory disclosures would be made on
19 or before the 15th of January and that your
20 supplementation would have to do with new events that
21 were occurring, for example any requests for
22 additional information that the staff would file, any
23 responses that TVA would respond with. So the vast
24 majority should be completed by the 15th.

25 I realize that none of the parties are

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1 going to have their witness lists together at that
2 particular point in time. All that I anticipate doing
3 is just checking in again approximately the beginning
4 of February to see where the parties are.

5 And I believe that we should be in a much
6 better position at that point to make a determination
7 as far as deadlines go for, again, requesting Subpart
8 N or G. We're not doing that at this point in time.
9 Any requests for cross examination, any motion for
10 summary disposition, we would set a schedule after
11 that next status conference.

12 At this point, I don't feel the need to go
13 ahead and be more specific, given the fact that we are
14 not going to be going to a hearing on this matter
15 prior to January of 2011. So we have some time to
16 allow you to work this out, both from the standpoint
17 of the parties working out their strategies,
18 identifying their witnesses, without delaying the
19 proceeding.

20 It seems that the big issue as far as the
21 timing of going to a hearing is going to be the
22 publication of the environmental impact statement,
23 which we hope will occur, you know, on or before
24 January 2011.

25 MR. BESSETTE: We appreciate that, Your

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1 Honor, we just wanted to clarify that there would be
2 ongoing disclosures.

3 One final issue. I thought it might be
4 worth raising a couple of the issues you mentioned in
5 your conference schedule with regard to the timely
6 filing of any new contentions. And, you know, it is
7 a long time before the EIS and I thought we might
8 address that, whether we could to agree to 30 days
9 from any new issue and response time to any such new
10 contention.

11 CHAIRMAN McDADE: Well, at this point, I
12 am no predisposed to setting a specific time. Let me
13 just make it very clear that as far as this Board is
14 concerned, good cause is considered the primary issue.
15 And, therefore, what we are going to be looking at is
16 when the information became available. And whether or
17 not, in context, the parties responded appropriately.

18 It may well be that 30 days after the
19 material is submitted is too long or too short. I
20 mean at this point in time we anticipate that -- at
21 this point, I have no idea how much material is going
22 to be turned over to the Alliance for Clean Energy.

23 Their response is going to be a function
24 of going through that material and, you know, if we're
25 talking about ten pages of material in the mandatory

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1 discovery, I would anticipate we would have a very
2 strict deadline for them responding to that.

3 On the other hand, if we're talking about
4 tens of thousands of pages for them to go through,
5 then the amount of time that it is going to take for
6 them to do that to determine whether or not a new or
7 an amended contention is appropriate would be longer.
8 So I'm not predisposed at this point in time to set a
9 specific deadline.

10 At the next status conference in early
11 February, we should be because at that point in time,
12 all of you will have an idea of how much material you
13 are dealing with. At this point, I really don't have
14 an idea of how much new material is going to be coming
15 in.

16 MR. BESSETTE: Appreciate that. And we'll
17 just -- it will be on the agenda for the next call.
18 Thank you.

19 CHAIRMAN McDADE: Okay. From the
20 standpoint of the NRC staff, is there anything further
21 that you believe we should take up at this particular
22 status conference?

23 MR. SUTTENBERG: This is Jeremy
24 Suttенberg. There is nothing further that we think
25 should be taken up at this conference.

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1 CHAIRMAN McDADE: Okay. We will be
2 issuing another notice sometime in late January for a
3 status conference in early February. If there any
4 issues that arise by any of the parties prior to that
5 time, if they could notify the Board with copies to
6 all of the other parties, and if there are any matters
7 that you believe should be taken up at the next status
8 conference, again, if you could notify the Board with
9 copies to the other parties so that we can make sure
10 that we cover those and everyone has an opportunity to
11 think about them before the status conference.

12 MS. CURRAN: Judge McDade?

13 CHAIRMAN McDADE: Yes, Ms. Curran?

14 MS. CURRAN: I was just looking down your
15 list of questions and I noticed one that it might make
16 sense to talk about now. You had had a question about
17 the rules. How one would make consistent the various
18 rules about filing new or amended contentions because
19 a ten-day limit to respond to motions and I don't
20 know, something like a 25-day limit to respond to
21 contentions --

22 CHAIRMAN McDADE: Yes.

23 MS. CURRAN: -- would that be worthwhile
24 dealing with now? Because I know there are some RAIs
25 out that are going to be answered. And we may be

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1 sending in contentions based on those.

2 I thought it might make sense to just
3 dispose of that.

4 CHAIRMAN McDADE: Okay. And I take it
5 from the standpoint of Southern Alliance, it is your
6 view that motions for leave to file new or amended
7 contentions should have the same timing as filing
8 contentions as opposed to the normal ten days for
9 filing other kinds of motions. Is that correct?

10 MS. CURRAN: Yes. It is. And I would add
11 to that that it doesn't really make sense to us to
12 impose a rule requiring a consultation with opposing
13 parties about whether they would oppose the admission
14 of a contention because, you know, it is a substantive
15 thing. It's not a procedural motion.

16 MS. SUTTON: Your Honor, this is Kathryn
17 Sutton on behalf of TVA. We believe that 2.324(b)
18 should remain in effect for purposes of consultation.
19 The procedural nature of a motion does not really
20 trigger that. There are other considerations as well.
21 And we think that true consultation -- an attempt at
22 it is worthwhile.

23 CHAIRMAN McDADE: From the NRC staff? Mr.
24 Sutttenberg?

25 MR. SUTTENBERG: Yes, this is Jeremy

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1 Suttenberg. Hold on one second. I'm going to put you
2 on moot.

3 CHAIRMAN McDADE: I think he's going to
4 put you on mute.

5 MS. SUTTON: I think he just did.

6 CHAIRMAN McDADE: Yes, mute, not moot.

7 MR. SUTTENBERG: Hi, this is Jeremy
8 Suttenberg again. The NRC staff also thinks that a
9 consultation should be required.

10 CHAIRMAN McDADE: This is Judge McDade,
11 again, quite frankly, I believe the consultation is
12 appropriate as well. It may well be, hopefully if the
13 parties have the appropriate spirit of cooperation, if
14 a contention is identified, it may well be that the
15 staff and the applicant would view that an obligation
16 were a desire to correct the deficiency.

17 But I do think the extra time limit, I
18 think for preparing a contention, from my standpoint
19 and the standpoint of the Board, when contentions come
20 in, we want them to be thoughtful. We want them to be
21 appropriate. The ten-day period of time, I think is
22 relative short in order to allow that.

23 So basically we would be looking at the
24 time frame for new contentions but we would direct
25 that the parties have the consultation pursuant to

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1 324(b) to see whether or not it can be resolved. But
2 we're not going to hold the parties -- the intervener
3 petitioner to a ten day as far as the motion.

4 Anything further from Southern Alliance?

5 MS. CURRAN: No, that sounds fine. We're
6 perfectly -- we're very willing to consult it's just
7 never been my experience that on these substantive
8 questions that it yielded much. But certainly we're
9 always willing to try.

10 CHAIRMAN McDADE: Okay. Anything further
11 from Morgan, Lewis?

12 MR. BESSETTE: No, Your Honor, that
13 clarifies things. This is Paul Bessette. I assume,
14 though, with regard to the -- we would have the normal
15 25 days to respond as well rather than the ten days to
16 a motion.

17 CHAIRMAN McDADE: Yes.

18 MR. BESSETTE: All right.

19 CHAIRMAN McDADE: I mean the extension of
20 time works both ways.

21 MR. BESSETTE: Thank you for that
22 clarification, Your Honor.

23 CHAIRMAN McDADE: And from the standpoint
24 of the staff, anything further to be taken up at this
25 point?

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1 MR. SUTTENBERG: This is Jeremy
2 Sutttenberg. Nothing further at this point. Thank
3 you.

4 CHAIRMAN McDADE: Okay. Then that should
5 close things for today. We will be issuing an order
6 in later January. What I would ask is the parties
7 advise our Law Clerk, Wen Bu, whether or not there are
8 any days or times within that first week in February
9 when you would not be available. And we will issue a
10 scheduling order accordingly.

11 That's all. Thank you very much. Have a
12 good holiday.

13 (Whereupon, the above-entitled
14 teleconference was concluded at 3:26 p.m.)

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CERTIFICATE

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

Name of Proceeding: Pre-Hearing Conference

Docket Number: 50-391-OL

Location: (teleconference)

were held as herein appears, and that this is the
original transcript thereof for the file of the United
States Nuclear Regulatory Commission taken by me and,
thereafter reduced to typewriting by me or under the
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Eric Mollen
Official Reporter
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