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ASLBP Number: 21-969-01-EA-BD01

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD

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PRE-HEARING CONFERENCE

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In the Matter of: : Docket Nos.
TENNESSEE VALLEY : EA-20-006 and EA-20-007
AUTHORITY : ASLBP No.
(Enforcement Action) : 21-969-01-EA-BD01

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Wednesday, July 21, 2021

Teleconference

BEFORE:
PAUL S. RYERSON, Chairman
E. ROY HAWKENS, Administrative Judge
SUE H. ABREU, Administrative Judge

1 APPEARANCES:

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P R O C E E D I N G S

10:00 A.M.

1
2
3 JUDGE RYERSON: Good morning. This
4 teleconference concerns TVA's request for a hearing on
5 an NRC order that imposes a civil penalty on TVA in
6 the amount of \$606,942. This is Judge Ryerson. On
7 the line with me are my fellow board members, Judge
8 Hawkens and Judge Abreu.

9 Just a few administrative matters before
10 we take appearances. First, please remember to
11 identify yourself when speaking. This proceeding is
12 being transcribed and a transcript will be available
13 on the NRC's website in a few days.

14 We've also made available listen only
15 telephone lines so interested members of the public
16 can follow along in real time.

17 I'll go over how we will proceed after we
18 take appearances. With that in mind, Judge Hawkens,
19 anything to add at this point?

20 JUDGE HAWKENS: No, nothing to add, Judge
21 Ryerson. Thank you.

22 JUDGE RYERSON: Thank you, Judge Hawkens.
23 Judge Abreu?

24 JUDGE ABREU: Nothing to add.

25 JUDGE RYERSON: Thank you. Let's begin

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1 with appearances of counsel for TVA. Who do we have
2 today?

3 MR. WALSH: Good morning, Your Honor.
4 This is Tim Walsh with Pillsbury here. And with me in
5 the room is my colleague, Mike Lepre, also with
6 Pillsbury, and my co-counsel from O'Melveny, Laurel
7 Rimon, Amanda Santella, and Sam Lehman. And also on
8 the phone from O'Melveny is Mary Pat Brown.

9 JUDGE RYERSON: Thank you. Welcome to all
10 of you. And Mr. Walsh, I assume if we have questions,
11 we should direct them to you in the first instance?

12 MR. WALSH: Yes, that works fine. And if
13 I need to consult with my colleagues, I will certainly
14 advise.

15 JUDGE RYERSON: All right, thank you. And
16 for the NRC staff who do we have?

17 MS. KIRKWOOD: Good morning, this is Sara
18 Kirkwood, counsel of the NRC staff, and I'm
19 accompanied by Kevin Roach and I think that's it.

20 JUDGE RYERSON: Okay. And again, we
21 should refer to you or respond to you, Ms. Kirkwood,
22 if we have any questions for TVA?

23 MS. KIRKWOOD: For the NRC staff.

24 JUDGE RYERSON: Thank you and welcome to
25 you.

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1 All right, the purpose of today's call is
2 set out in our July 1 order and that is to help the
3 Board prepare case management instructions for the
4 oral part of the evidentiary hearing that is scheduled
5 for October 18.

6 And we'd like to begin with a discussion
7 of the items as they're set forth in that July 1
8 order. And as you will recall, we've asked that the
9 parties, where practicable, consider trying to reach
10 agreement on recommendations of some of these issues.

11 So let's begin with the first one which
12 essentially is where should the oral part of the
13 hearing be conducted and how? And is there any
14 agreement on that?

15 Let me start first with Mr. Walsh.

16 MR. WALSH: Thank you, Your Honor. Yes,
17 we consulted with staff counsel last week and I think
18 we've reached agreement on most every item on your
19 list, so we'll happily go through those areas.

20 And with respect to the first one, the
21 parties have agreed that the hearing should be
22 conducted primarily in person and most likely at this
23 point in Chattanooga where most of the likely
24 witnesses are going to be located.

25 The parties also think that the hearing

1 should provide for limited use of virtual or remote
2 testimony for a case where a witness is unable to
3 travel to Chattanooga for the hearing.

4 Ms. Kirkwood, did I cover all of our
5 points there I think?

6 MS. KIRKWOOD: Yes, I agree with that
7 statement. We're just a little concerned with the
8 vagaries of travel lately that witnesses that have
9 further to travel may -- I'm just having trouble
10 predicting the future, so I wanted some provision in
11 case we couldn't get people in from overseas, that
12 type of thing.

13 JUDGE RYERSON: I think we all have
14 trouble predicting the future especially right now.
15 I must say the Board was thinking -- I think everybody
16 is in agreement that if it's feasible a substantially
17 in-person hearing would be desirable. I guess the
18 Board was thinking at least for the convenience of all
19 counsel, the Board's hearing room might make a lot of
20 sense.

21 Do you have a sense of how many witnesses
22 you would expect to appear in person and how many of
23 them are in the Chattanooga area?

24 MR. WALSH: Thank you, Your Honor. At
25 this time, TVA is still working through its case,

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1 obviously, but we initially identified 15 individuals
2 as potential witnesses for the hearing. And I think
3 all but one of them are located in either Chattanooga
4 or Knoxville.

5 JUDGE RYERSON: Okay, and I know you
6 referenced having a motion that was jointly filed to
7 slightly extend the case schedule, that Mr. McBrearty,
8 who I suspect is very likely to be a significant
9 witness, is currently out of the country. Is that
10 still the case?

11 MR. WALSH: Ms. Kirkwood would better be
12 able to speak to that I think, Your Honor.

13 MS. KIRKWOOD: Your Honor, as I understand
14 it, he is possibly in the country right now, but is
15 transitioning to Portugal. He is one of the witnesses
16 that I'm concerned about his ability to get to
17 Chattanooga, just because of the international travel
18 aspect of it.

19 JUDGE RYERSON: Yes, understandably so.
20 I'm not sure our subpoenas extend to Portugal and
21 also, I the guess, in this day and age if someone were
22 to come for the hearing directly from a foreign
23 country, I'm not sure what sort of quarantine
24 protocols might prevent an in-person appearance.

25 MS. KIRKWOOD: That was my biggest

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1 concern.

2 JUDGE RYERSON: Mr. Walsh, have you
3 deposed Mr. McBrearty? Was he on your list? I don't
4 recall.

5 MR. WALSH: Yes, we did depose him, Your
6 Honor.

7 JUDGE RYERSON: Okay. And Ms. Kirkwood,
8 did you take his deposition for purposes of preserving
9 testimony or you just permitted Mr. Walsh's firm to
10 depose Mr. McBrearty?

11 MS. KIRKWOOD: We did not depose Mr.
12 McBrearty.

13 JUDGE RYERSON: Right.

14 MS. KIRKWOOD: Mr. Walsh did depose Mr.
15 McBrearty.

16 JUDGE RYERSON: Okay.

17 MS. KIRKWOOD: I didn't speak with him
18 personally, but TVA --

19 MS. BROWN: Judge, if I can interrupt.
20 This is Mary Pat Brown from O'Melveny. I deposed Mr.
21 McBrearty and he was in the U.S. at the time, but we
22 did it by video.

23 JUDGE RYERSON: I'm sorry?

24 MS. BROWN: This is Mary Pat Brown from
25 O'Melveny.

1 JUDGE RYERSON: Yes. I just missed the
2 last sentence.

3 MS. BROWN: I was the one who deposed Mr.
4 McBrearty about two weeks ago. He was in the United
5 States at the time. We did it by video, but he did
6 mention that he intended to be an ex-pat in Madrid,
7 excuse me, in Lisbon.

8 JUDGE RYERSON: Lisbon, okay. Well,
9 certainly, I think we'd have to consider his testimony
10 coming remotely based on the facts as you're
11 describing them.

12 MS. KIRKWOOD: Your Honor, it might make
13 sense to -- I know it's a little hard to plan this far
14 out with everything changing. This is Sara Kirkwood
15 again. But we may need to consider doing some version
16 of a hybrid hearing where portions of it are done in
17 TVA when we have the witnesses who are there
18 testifying, but especially for remote witnesses, it
19 may be that the Board Hearing Room is better equipped
20 to receive remote testimony.

21 JUDGE RYERSON: I think that is likely to
22 be the case for remote witnesses.

23 Did the parties consider where, if we were
24 to have an oral evidentiary hearing in Tennessee,
25 where we might do that?

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1 MR. WALSH: Your Honor, this is Tim Walsh
2 here. We don't have a precise location identified.
3 As you're very familiar, our typical practice is to
4 secure some sort of federal courtroom or other
5 courtroom where appropriate for these types of things,
6 but we've not researched a particular location at this
7 time.

8 JUDGE RYERSON: Right.

9 MS. KIRKWOOD: Your Honor, the other
10 possibility might be the Technical Training Center
11 which is also there.

12 JUDGE RYERSON: Yes. I'm wondering
13 whether that's set up very well for an evidentiary
14 hearing.

15 Let me ask this, I know that we're quite
16 a distance from an oral evidentiary hearing, but how
17 long would you expect -- well, let me begin with your
18 case, Ms. Kirkwood. How many days would you expect
19 your witnesses will take?

20 MS. KIRKWOOD: Your Honor --

21 JUDGE RYERSON: You're not bound by this,
22 but just a ballpark.

23 MS. KIRKWOOD: Realistically, and this
24 depends on -- it depends on what stipulations, but
25 based on the number of witnesses we currently have

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1 identified, I think it would be a couple of weeks.

2 JUDGE RYERSON: A couple of weeks?

3 MS. KIRKWOOD: And I am hopeful that some
4 of those will go away through stipulations.

5 JUDGE RYERSON: Okay.

6 MS. KIRKWOOD: There is almost a steep
7 overlap between our witness list and TVA's witness
8 list.

9 JUDGE RYERSON: Yes. Your direct
10 testimony is coming in in writing, correct?

11 MS. KIRKWOOD: We would like to discuss
12 that. I don't know if you want to discuss that right
13 now if you want us to discuss it later.

14 JUDGE RYERSON: Well, I guess the two are
15 somewhat related. I mean in a way, we have to ask Mr.
16 Walsh. If your testimony, your witnesses' testimony
17 were all pre-filed testimony, then the real question
18 I guess is for Mr. Walsh, how long does he expect to
19 depose those witnesses, but since he hasn't seen the
20 pre-filed testimony, that would be a little difficult
21 for him.

22 All right, let me express this concern,
23 just as a practical matter. It may or may not be the
24 case that this hearing drags on for days or weeks, but
25 if it were -- if that were a realistic possibility, I

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1 think we can pretty much forget about borrowing a
2 state or federal courthouse. We routinely do that and
3 the courts are usually very kind to give us a day or
4 two when we need that if there's a court in the
5 appropriate vicinity. But I think the ability of most
6 courts to give us a courtroom for a number of weeks is
7 probably wearing out our welcome a bit. So going to
8 Tennessee might require renting space unless again the
9 NRC's facility down there would be appropriate. So
10 we'll have to certainly give some thought to that.

11 Mr. Walsh, do you have any views about the
12 length of the hearing? Again, you're not being bound
13 by this at this point.

14 And I must say the Board may have an
15 instinct to cut cross examination to a limited extent,
16 but what is your sense realistically, your best guess
17 right now, which is just a guess, of how long this
18 hearing should take?

19 MR. WALSH: Thank you, Your Honor. Best
20 guess now would be a week and a half, based on number
21 of witnesses that we've identified and the larger
22 number of witnesses that the staff have identified.

23 JUDGE RYERSON: And that's a week and a
24 half for both witnesses -- for both sides and cross
25 examination?

1 MR. WALSH: That would be our hope, Your
2 Honor, yes.

3 JUDGE RYERSON: Okay. All right. Well,
4 we will have to give some thought to this. Again,
5 it's a moving target because at the moment, I don't
6 think we could even use the NRC building and I'm not
7 sure what the protocols are in the various facilities
8 in Tennessee.

9 Judge Hawkens, did you have any questions
10 about this topic at this point?

11 JUDGE HAWKENS: No, I do not. Thank you.

12 JUDGE RYERSON: Judge Abreu?

13 JUDGE ABREU: None.

14 JUDGE RYERSON: Okay. Thank you. Well,
15 let's get on for the second issue which sounds a
16 little more substantive, perhaps, than I thought it
17 would be because clearly we were contemplating written
18 direct testimony.

19 Let me just say, too, that we may have
20 been neglectful in alerting you to -- all we were
21 really talking about here was to alert you to a change
22 in practice. I know both firms, well, principal firms
23 were -- well, the NRC staff and the Pillsbury firm are
24 quite familiar with NRC practice, but we wanted to
25 alert you that a couple of years ago, the normal

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1 format for submitting pre-filed exhibits changed a bit
2 for reasons that I confess I do not understand by
3 asking the parties to use a sheet in advance of an
4 exhibit with the exhibit number on it, the wonders of
5 ADAMS or such that ADAMS was able to avoid duplicating
6 every exhibit twice which they used to have to do for
7 reasons I won't even go into.

8 But in any event what I was -- what we,
9 the Board, was going to suggest is that our order, our
10 instructions, will be very similar to those that are
11 explained in a March -- I think it's March or is it
12 May? Let me find it.

13 A May 23, 2019 order in the Seabrook case
14 that preceded the evidentiary hearing in that case.
15 And that explains pretty much the mechanics of pre-
16 filed exhibits and pre-filed testimony, so you may
17 want to look at that. Our order will probably largely
18 track that. It may be simplify it a bit. But that's
19 what we were thinking mechanically in terms of pre-
20 filing.

21 The larger issue that Ms. Kirkwood raises
22 is why would we want anything for direct testimony in
23 a case such as this other than pre-filed written
24 testimony? Why would you need to bring in witnesses
25 and have them say what they are prepared to have

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1 written down and signed?

2 Ms. Kirkwood?

3 MS. KIRKWOOD: Well, Your Honor, I think
4 the fundamental issue we're having in thinking about
5 pre-filing our witness testimony is that most of the
6 witnesses are not our employees. They are TVA
7 employees or ex-TVA employees, so we don't control
8 them.

9 Typically, in a licensing case, we'd be
10 sitting with staff witnesses working with them on
11 testimony. But we don't have the ability to do that
12 with witnesses that are not our own. And several of
13 them that are part of our direct case are actually
14 hostile witnesses, I think would be treated by a court
15 as hostile witnesses which makes pre-filing their
16 testimony and getting them to swear to it even more
17 challenging.

18 So we've been looking backwards to find
19 examples of enforcement cases where testimony was pre-
20 filed and it's pretty rare. We did find one quite old
21 one where the Board issued a subpoena to the witnesses
22 to also come and work on our testimony and made an
23 exception for hostile witnesses. But I think TVA also
24 does not want to do pre-filed testimony. I can let
25 Mr. Walsh speak to that, but we think where

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1 credibility is at issue, for the Board to hear the
2 live testimony makes a lot more sense.

3 JUDGE RYERSON: What you're also saying is
4 that in some instances it may be impossible -- if you
5 have a hostile witness that you would like to be your
6 witness, it's really not feasible to get pre-filed
7 testimony is what you're saying?

8 MS. KIRKWOOD: I can't figure out how to
9 do pre-filed testimony that would look like pre-filed
10 testimony that I'm used to submitting.

11 JUDGE RYERSON: Yes.

12 MS. KIRKWOOD: We've had a variety of
13 thoughts of things we could do, you know, cobbling
14 together slices of deposition transcripts or from the
15 OI interviews, but it would be cobbled.

16 JUDGE RYERSON: Yes. Mr. Walsh, Ms.
17 Kirkwood is representing that you, as well, did not
18 entirely favor pre-filed written testimony. Is that
19 correct?

20 MR. WALSH: Yes, that is correct, Your
21 Honor. First and foremost in our mind is the fact
22 that this is not a technical or licensing matter where
23 having a lot of facts laid out in writing ahead of
24 time would be beneficial for all involved.

25 You know, this is an enforcement matter

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1 and I'll just note, too, that enforcement matters are
2 identified in the rule as being not requiring pre-
3 filed testimony in a Subpart G hearing.

4 And also, too, as Ms. Kirkwood has alluded
5 to, the parties have agreed to work towards factual
6 stipulations in this proceeding to make the hearing
7 more efficient. And we think that most disputes at
8 the hearing will be on why something happened rather
9 than on what happened.

10 So for us, we don't see the need to have
11 a lot of that laid out in writing ahead of time and
12 think that an oral hearing would be better suited for
13 these purposes.

14 JUDGE RYERSON: Well, you're jumping ahead
15 to Item 3, which was our hope that many of the -- what
16 shall I say, hard facts could be reduced to
17 stipulations. I am guessing there's not a whole lot
18 of disagreement about what happened, but there's
19 obviously disagreement about why it happened.

20 Are you on target, do you think -- let me
21 put this since we're speaking, Mr. Walsh, to have
22 stipulations -- but I guess, when we contemplated pre-
23 filed written testimony, I think September 8th was the
24 date for that. Do you think you would have
25 stipulations by then that would cover most of the

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1 undisputed hard facts, if you will?

2 MR. WALSH: That is the hope, Your Honor.

3 JUDGE RYERSON: Yes.

4 MR. WALSH: In our discussions with the
5 staff last week, we're aiming towards having something
6 agreed to by the end of August which then would --
7 could, of course be filed with the Board, but also we
8 do intend to file, do have a pre-trial brief of sorts
9 where we lay out our case, just not with written
10 testimony of individual witnesses. But that pre-filed
11 briefing would rely on, where appropriate, the
12 stipulations that we've agreed to.

13 Ms. Kirkwood, please add anything if I've
14 overlooked something there, but that's what we were
15 discussing last week and that's what we're going to
16 work towards.

17 JUDGE RYERSON: Okay. Let me jump
18 somewhat back to the question of pre-filed written
19 testimony, and I ask two questions.

20 And let me start again with Ms. Kirkwood,
21 since you will presumably go first, you have the
22 burden of proof here, at least in the first instance.

23 Do you see any witnesses that you'll be
24 putting on who would cooperate and sign under oath
25 pre-filed written testimony for you? Are you talking

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1 exclusively about witnesses just showing up for the
2 hearing?

3 MS. KIRKWOOD: Although it depends on what
4 you want us to do. I mean, we will put on a witness
5 from the NRC staff to discuss how we arrived at the
6 penalty and what civil penalty is appropriate. I
7 could pre-file that without a problem.

8 I haven't actually discussed with
9 witnesses their willingness to write pre-filed
10 testimony and I think there's going to be a variety of
11 comfort levels with that, some of whom I wouldn't
12 necessarily deem as fully hostile, but are still
13 employed by TVA and won't want to be -- and may be
14 uncomfortable with that level of cooperation or feel
15 the need to engage with in-house counsel which puts
16 this in a very awkward position for us.

17 JUDGE RYERSON: Yes. Let me ask you then,
18 I mean you contemplate NRC staff witnesses that you
19 describe as somewhat hostile or even hostile, and
20 therefore, you don't see their really wanting to
21 cooperate to sign under oath pre-filed testimony.

22 Do you expect these hostile witnesses to
23 show up for the hearing? Is that an issue for you?

24 MS. KIRKWOOD: They showed up for
25 depositions. Some of them are -- they're currently

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1 employed by TVA. I don't think they'll ignore us a
2 subpoena or an order of the Board.

3 It's just -- to me, there's a difference
4 between showing up at a hearing when you've been
5 ordered to do so and answering questions under oath
6 versus working with counsel with the NRC to develop
7 written testimony.

8 JUDGE RYERSON: Yes. All right. Let me
9 put the question to you, Mr. Walsh. Do you see some
10 witnesses for which you could prepare pre-filed
11 testimony?

12 MR. WALSH: Your Honor, as you noted, the
13 staff has the burden to prove its case by a
14 preponderance of the evidence and so I don't see a
15 circumstance where TVA would file testimony unless
16 it's reciprocated by the staff at the same time. But
17 absent that, it's something that we could do, but it
18 would have to be, as I said, in an appropriate,
19 structured way.

20 JUDGE RYERSON: Yes. All right. Judge
21 Hawkens, any further questions on this topic at this
22 time?

23 JUDGE HAWKENS: No questions, Judge
24 Ryerson, but I would just observe that Mr. Walsh said
25 they had contemplated submitting pre-filed briefs that

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1 would effectively be roadmaps using the stipulated
2 hard facts.

3 And to the extent they maximize agreements
4 on stipulations and to the extent they really put a
5 lot of effort, it's providing details with their pre-
6 filed briefs and showing us the direction their case
7 in chiefs are going, I think that would be very
8 useful. And that's all I have. Thank you.

9 JUDGE RYERSON: An excellent point, Judge
10 Hawkens. I agree completely.

11 Judge Abreu, anything?

12 JUDGE ABREU: I have nothing to add.
13 Thank you.

14 JUDGE RYERSON: Thank you. All right,
15 well, I think we've already discussed expected
16 stipulations unless either Ms. Kirkwood or Mr. Walsh
17 has something further.

18 I think obviously, where we have a large
19 number of potential witnesses, if some of the
20 witnesses really are not needed because they're just
21 filling in facts that are not genuinely in dispute,
22 stipulations would be very desirable in this case to
23 deal with those sorts of really, truly undisputed
24 facts.

25 Let's get on to motions. I'll start with

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1 you again, Ms. Kirkwood, although I'm guessing that
2 you do not contemplate summary disposition motions.
3 Is that correct?

4 MS. KIRKWOOD: No, we do not intend to
5 file a summary disposition motion.

6 JUDGE RYERSON: Right. And Mr. Walsh, you
7 will recall that the Board expressed some skepticism
8 early on as to whether this is an appropriate case for
9 summary disposition. But we decided not to prohibit
10 summary disposition motions, but we basically took
11 them out of the schedule. You can file them up to
12 September 8, if you want, but we will call for a
13 response only if we see a need and I guess we would
14 almost certainly then have to adjust the hearing
15 schedule if we, in fact, ask for responses.

16 With that in mind, is it TVA's present
17 intention to file summary disposition motions?

18 MR. WALSH: Yes, Your Honor, it is TVA's
19 present intent to do so. Without getting into
20 specifics, TVA believes that more than one violation
21 can be resolved in TVA's favor on legal grounds alone
22 and based on facts that are not in dispute.

23 And we anticipate filing our dispositive
24 motions in a time frame such that it will allow time
25 for the staff to respond and for the Board to rule

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1 before the hearing. And we're anticipating doing so
2 in the first half of August.

3 JUDGE RYERSON: Thank you. All right,
4 well, that will be interesting.

5 Motions in limine, and let me give you --
6 well, let me state the Board's overall view here, at
7 least the view of some of us.

8 There are exceptions and I think we
9 alluded, we dealt with one exception early on in this
10 case and that was the notion that if TVA intends to
11 rely on the advice of counsel through its Office of
12 General Counsel in its defense, it cannot
13 simultaneously withhold as privileged documents that
14 might otherwise be able to withhold as privileged, and
15 that further, as we suggested, it would not seem
16 terribly fair if TVA preserved -- tried to preserve a
17 privilege through all of discovery, and then made a
18 decision after discovery that it was going to open up
19 its own lawyers' thinking in its defense. So that is
20 sort of a different issue.

21 But in general, generally, I know it's my
22 view and I believe the view of at least the majority
23 of the Board, probably the whole Board, that in non-
24 jury cases, there's not a whole lot of advantage to
25 trying to agonize over what evidence is inadmissible

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1 and what evidence is merely unpersuasive. For the
2 most part, the Rules of Evidence were created,
3 designed for jury trials, and they have the effect,
4 most of the time, of keeping evidence away from the
5 finder of fact, that is the jury.

6 In bench-trying cases, and cases before
7 administrative judges, you know, we have to look at
8 the evidence to decide whether -- or consider the
9 evidence -- and again, I'm not sure how far down the
10 road in that endeavor it usually makes sense to go.

11 I will alert you that my views, at least,
12 are set forth in a footnote in the GE Hitachi case,
13 that was a mandatory hearing case dealing with the
14 laser-based enriched uranium. And the cite is 76 NRC
15 at 248 note 171. And there's a fairly extended
16 discussion of why, at least, that Board, which I
17 chaired, did not think that it was very worthwhile to
18 get into the admissibility of evidence in most
19 situations.

20 Another cite is the Honeywell case which
21 I also chaired and on which Judge Hawken served. And
22 the cite there is 75 NRC at 267. And there, the
23 parties agreed that motions in limine were unnecessary
24 because they would merely repeat arguments in their
25 respective statements of position.

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1 Having said that, do you contemplate
2 summary disposition motions at this point?

3 Let me start with Ms. Kirkwood.

4 MS. KIRKWOOD: Are you asking about
5 summary disposition or in limine motions?

6 JUDGE RYERSON: I'm sorry. I'm confused.
7 In limine motions.

8 MS. KIRKWOOD: That's fine. I was
9 wondering after the questions --

10 JUDGE RYERSON: Yes, no, I misstated.
11 Thank you.

12 MS. KIRKWOOD: I'm honestly not sure. I
13 don't think we will -- without having seen TVA's pre-
14 trial brief, I don't have anything I'm planning to
15 move in limine right now, but I wouldn't rule out the
16 possibility.

17 JUDGE RYERSON: Okay. And Mr. Walsh, do
18 you presently contemplate in limine motions?

19 MR. WALSH: Thank you, Your Honor. No, we
20 do not presently contemplate them, but as Ms. Kirkwood
21 said, we reserve the right to use them as appropriate
22 and as warranted.

23 JUDGE RYERSON: Okay. Thank you. Again,
24 let me ask Judge Hawkens, any questions on this issue?

25 JUDGE HAWKENS: No questions. Thank you.

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1 JUDGE RYERSON: Judge Abreu?

2 JUDGE ABREU: No questions. Thank you.

3 JUDGE RYERSON: Thank you. All right.

4 The next item, let's see, what is our next item? Any
5 other motion issues that the parties contemplate at
6 this point?

7 Ms. Kirkwood?

8 MS. KIRKWOOD: I don't have any motions
9 that I'm contemplating right now. I would like to
10 discuss what you want in the pre-trial brief a little
11 bit more, but we can do that now or later.

12 JUDGE RYERSON: Well, maybe we'll add that
13 as an additional topic after we get through the ones
14 that are here, but I think Judge Hawkens raised a very
15 good point about how that could be potentially a
16 substitute for some of the pre-filed direct in some
17 ways.

18 Mr. Walsh, any other motions that you
19 contemplate potentially filing at this point?

20 MR. WALSH: No, Your Honor, none planned
21 at this time.

22 JUDGE RYERSON: Okay. Thank you. The
23 next item, perhaps may be mooted, simply affirming the
24 Board's view that if the parties do file pre-filed
25 written testimony, unless the Board and the opposing

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1 party conclude otherwise that the witness must be
2 available to be examined orally, but I don't really
3 think unless the parties have something to say about
4 that, that that really is much of an issue at this
5 point.

6 Ms. Kirkwood, anything further on that?

7 MS. KIRKWOOD: I don't have anything on
8 that, Your Honor.

9 JUDGE RYERSON: Yes. Mr. Walsh?

10 MR. WALSH: Nothing further for TVA
11 either, Your Honor.

12 JUDGE RYERSON: Okay. All right. And I
13 think we raised the point in our Rule 615 in the
14 Federal Rules of Evidence actually says that a court
15 must exclude witnesses, keep them from hearing the
16 testimony of other witnesses if either party, any
17 party asks for that.

18 Does either party here intend to ask for
19 that and that we need to -- if so, we need to decide
20 how strictly we apply the rules.

21 In any event, Ms. Kirkwood, is the staff
22 intending to invoke Rule 615?

23 MS. KIRKWOOD: Yes, Your Honor. I think
24 we both are.

25 JUDGE RYERSON: You both are. Okay.

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1 Interesting. We'll have to give some thought to that.

2 My instinct has been that with pre-filed
3 written testimony, that's kind of really difficult to
4 enforce and I'm not sure it makes a lot of sense.
5 It's not something that boards generally do.

6 The only time I recall a case that I was
7 involved in where we did it, was again the GE Hitachi
8 laser-enrichment case, where the security level of
9 some of the testimony was sufficiently high that not
10 all of the witnesses were able to listen to it, so we
11 kept people out of the courtroom at various times
12 largely for that reason, but we also relied on 615.

13 Well, if we have mostly oral testimony, I
14 suppose that's reasonable. We'll have to give some
15 thought to that. If both parties agree, I guess
16 that's somewhat persuasive.

17 Judge Hawkens, any thoughts on that issue?

18 JUDGE HAWKENS: None. Thank you.

19 JUDGE RYERSON: Judge Abreu?

20 JUDGE ABREU: None. Thank you.

21 JUDGE RYERSON: Okay. Thank you. All
22 right, well, let's move on to any additional issues
23 that the parties wanted to raise.

24 Ms. Kirkwood, you raised the question
25 about a pre-filed -- or rather the statements of

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1 position that would come in I guess on September,
2 under our current schedule, on September 8, when pre-
3 filed testimony, if any, would come in.

4 And what's your question there?

5 MS. KIRKWOOD: I just want to -- we want
6 to write something that the Board wants to read and is
7 looking for and is helpful to the Board.

8 I could conceive of -- one thought I had
9 to share with Mr. Walsh last week is we could do
10 written statements of position more in almost a hybrid
11 of what would be often considered an opening statement
12 where we preview what we expect the evidence to show
13 along with the closing legal conclusions. Or we could
14 write a pre-trial brief that was purely legal or one
15 that relied on stipulated facts.

16 The staff is willing to do whatever we're
17 asked to do. We just want clarity on what you're
18 looking for.

19 JUDGE RYERSON: Yes. It's my view and I
20 will sound out my fellow Board members, it's my view
21 it's the former. The first would be helpful to the
22 Board, that is, obviously, a statement of the theory
23 of your case, the legal basis for it, clearly
24 incorporating stipulations that you've agreed to, but
25 also, an explanation of what we should be looking for,

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1 what you expect to show. I think that would be the
2 ideal opening brief.

3 Judge Hawkens, do you have any differing
4 view or anything to add?

5 JUDGE HAWKENS: No. I do agree with that.
6 Although I'd like to see what the legal standards are
7 as the parties see them. I don't want that -- I don't
8 want it to be a purely legal document. It should be
9 a forerunner of your ultimate proposed findings of
10 fact and conclusions of law telling the panel what you
11 expect the facts, how they will come out, and why you
12 expect they'll come out that way, and then how that
13 fits into the legal framework to support your case.

14 JUDGE RYERSON: Thank you, Judge Hawkens.
15 Judge Abreu, anything further?

16 JUDGE ABREU: No. I agree with what's
17 been said. Thank you.

18 JUDGE RYERSON: Thank you. All right, do
19 the parties have any further issues to discuss now?
20 I think the Board has quite a bit to chew on, based on
21 your positions.

22 MS. KIRKWOOD: Your Honor, I -- sorry,
23 this is Sara Kirkwood for the NRC staff.

24 I heard Mr. Walsh say that he was
25 intending to file summary disposition motions in early

1 August, the first few weeks of August, so that it
2 wouldn't interfere with the hearing schedule.

3 I'm assuming that based on the Board's
4 original order that you would still direct us whether
5 or not you wanted the staff to respond to that.

6 JUDGE RYERSON: That is correct.

7 MS. KIRKWOOD: It's going to be a little
8 tricky for us to both write a summary disposition
9 response and also there may be some overlap.

10 JUDGE RYERSON: Right.

11 MS. KIRKWOOD: But also --

12 JUDGE RYERSON: The Board would have two
13 decisions. One, do we wish a response? And two, if
14 despite Mr. Walsh's efforts to get it in before the
15 September 8 deadline, whether it's realistic to expect
16 everybody to proceed with the same schedule if we do
17 call for a response, yes.

18 Again, Judge Hawkens, do you agree with
19 that?

20 JUDGE HAWKENS: I agree with that and if
21 we were to call for a response, I would anticipate we
22 would let you know quite quickly, Ms. Kirkwood.

23 JUDGE RYERSON: And Judge Abreu?

24 JUDGE ABREU: I agree.

25 JUDGE RYERSON: Thank you. All right, so

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1 we're in the same position as the prior scheduling
2 order that there's no responses required unless we
3 direct one and if we direct one, then we'll just have
4 to see what that looks like.

5 Again, it might actually -- it might be
6 easier now -- if there isn't, in fact, substantial
7 pre-filed written testimony, then it might be
8 realistic to get a response and decide that sooner
9 rather than later. But we'll cross that bridge, as we
10 say, when we get there.

11 All right, to the parties, anything
12 further at this point that you'd like to discuss?

13 Ms. Kirkwood.

14 MS. KIRKWOOD: I don't have anything
15 further.

16 JUDGE RYERSON: Mr. Walsh?

17 MR. WALSH: Nothing further from TVA, Your
18 Honor.

19 JUDGE RYERSON: Okay. Thank you. All
20 right, well, I must say our plan had been a hope that
21 we would get an order out quite promptly giving you
22 directions on pre-filed testimony, on how to file
23 exhibits and the like, and that then we would have one
24 more document, a formal Notice of Hearing, probably
25 considerably later because of the fluid circumstances

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1 of the use of the NRC or even NRC travel. I'm not
2 sure exactly what the status is of what might be
3 considered non-essential travel at this point by the
4 agency standards. Again, that's all likely to be
5 changing.

6 So that's where we were going to be. I
7 think you've raised several issues that will require
8 us to give a little more thought to it, so we might
9 not have an order as soon as I think we originally
10 contemplated. But that's the direction we are going.
11 I think that if as we think about it we see a need for
12 further consultation with the parties, we will
13 schedule another conference, but otherwise, we will
14 try to get out an order that deals with the state of
15 where we are at least as of now in this somewhat fluid
16 situation.

17 Judge Hawkens, anything further?

18 JUDGE HAWKENS: If, as we go forward,
19 assuming we are targeting Chattanooga with a hearing,
20 the Board will be looking at potential venue sites.
21 To the extent the parties come across any venues they
22 think would be appropriate, if you'd share that with
23 our law clerk, Mr. Curry, we'd be grateful, and he'd
24 be grateful as well. And that's it. Thank you.

25 JUDGE RYERSON: Thank you, Judge Hawkens.

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1 Judge Abreu, anything further?

2 JUDGE ABREU: No, nothing further. Thank
3 you.

4 JUDGE RYERSON: Thank you. All right, I
5 think that concludes what we hope to accomplish today.
6 As I said, we will be issuing an order as promptly as
7 possible, but perhaps not as quickly as we had
8 expected. And we stand adjourned. Thank you, all.

9 MS. KIRKWOOD: Thank you.

10 MS. BROWN: Thank you.

11 MR. WALSH: Thank you.

12 (Whereupon, the above-entitled matter went
13 off the record at 10:45 a.m.)

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