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Title: Tennessee Valley Authority: Watts Barr
Nuclear Plant Unit 1; Sequoyah Nuclear
Plant, Units 1 & 2; Browns Ferry Nuclear
Plant, Units 1, 2 & 3: **Pre-Hearing Conference**

Docket Number: 50-390-CivP et al.

Location: (telephone conference)

Date: Wednesday, January 9, 2002

Work Order No.: NRC-171

Pages 105-167

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

PRE-HEARING CONFERENCE

- - - - - X Docket Nos.

: 50-390-CivP;

IN THE MATTER OF: : 50-327-CivP;

TENNESSEE VALLEY AUTHORITY : 50-328-CivP;

(Watts Bar Nuclear Plant, : 50-259-CivP

Unit 1; Sequoyah Nuclear : 50-260-CivP;

Plant, Units 1 & 2; : 50-296-CivP;

Browns Ferry Nuclear : ASLBP No.

Plant, Units 1,2 & 3 : 01-791-01-CivP

: EA 99-234

- - - - - X

Wednesday, January 9, 2002

Via telephone conference call

The above-entitled matter came on for
hearing, pursuant to notice, at 10:00 a.m.,

BEFORE:

CHARLES BECHHOEFER, Chairman

RICHARD F. COLE, Administrative Judge

ANN MARSHALL YOUNG, Administrative Judge

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1 APPEARANCES:

2 On Behalf of the Licensee, Tennessee Valley
3 Authority,

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17 Office of General Counsel

18 Nuclear Regulatory Commission

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21 Rockville, Maryland

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23 ALSO PRESENT:

24 Lee Dewey, Esq., NRC/ASLBP

25 Nicholas Hilton, NRC/OE

P-R-O-C-E-E-D-I-N-G-S

(10:00 a.m.)

CHAIRMAN BECHHOEFER: Good morning, ladies and gentlemen. This is Charles Bechoefer and this is going to be the third pre-hearing conference we've held in this enforcement proceeding.

With me are the other two Judges on the Licensing Board.

Ms. Young, do you want to --

JUDGE YOUNG: This is Judge Ann Marshall Young.

JUDGE COLE: Judge Richard Cole, C-O-L-E.

CHAIRMAN BECHHOEFER: And with us here is also Lee Dewey, chief counsel for the Panel.

Could the parties and other participants who are on line identify themselves for the record so that we can create a record of the call?

MR. DAMBLY: Your Honor, this is Dennis Dambly with the General Counsel's Office for the NRC Staff. Along with me is Jennifer Euchner from OGC and Nick Hilton from the Office of Enforcement.

MR. MARQUAND: Good morning, Your Honors. This is Brent Marquand with Tennessee Valley Authority. John Slater and Ed Vigluicci, both in our General Counsel's Office are here with me.

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1 CHAIRMAN BECHHOEFER: How do you spell
2 Vigluicci? V-I-G-L-U-C-C-I or is that somebody
3 different.

4 MR. MARQUAND: That's very close. It's
5 V-I-G-L-U-I-C-C-I.

6 CHAIRMAN BECHHOEFER: Okay. We've called
7 this pre-hearing conference as we said we would at the
8 conclusion of the last pre-hearing conference to check
9 on the status of various items that were going on and
10 also, hopefully, to set some dates for future
11 activities.

12 First to start out with, discovery was
13 supposed to have terminated on December 31. Are there
14 any discovery matters remaining to be resolved?

15 MR. MARQUAND: Your Honor, both parties
16 have written discovery requests outstanding to each
17 other. Our responses are due back to the staff the
18 14th. The staff's responses to us, we talked about
19 that yesterday and we agreed that they could submit
20 theirs on the 22nd of January and I think that should,
21 at least as far as I know, pretty much end all of the
22 outstanding discovery matters.

23 MR. DAMBLY: I believe that's correct
24 also, Your Honor.

25 CHAIRMAN BECHHOEFER: Twenty-second or

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1 27th, did you say?

2 MR. MARQUAND: Twenty-two.

3 CHAIRMAN BECHHOEFER: Okay. Does either
4 party anticipate any problems arising out of
5 discovery, any motions to compel or similar types of
6 filings?

7 MR. MARQUAND: To this point, we've been
8 able to work out our differences and I anticipate that
9 we will be able to do that, hopefully we'll be able to
10 do that with respect to the outstanding discovery.

11 MR. DAMBLY: As far as I know, Your Honor,
12 we're not anticipating filing any motions to compel at
13 this point. Hopefully, we can work out anything as
14 Mr. Marquand said. If not, well, there's always the
15 possibility, but nobody that I'm aware of at the
16 moment thinks we're going to do that.

17 CHAIRMAN BECHHOEFER: Okay. Well, that's
18 all we wanted to check on.

19 JUDGE YOUNG: Since we are, in effect,
20 extending the discovery time limit -- this is Judge
21 Young -- I would encourage you to bring any possible
22 disputes to our attention as soon as possible if any
23 should develop so that we can keep the case moving at
24 a fairly timely schedule.

25 CHAIRMAN BECHHOEFER: I don't think this

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1 is an extension of the discovery that leaves time for
2 asking questions. It's the extension of the time when
3 responses are due. Okay, that sounds satisfactory.

4 The next matter, has there been any
5 discussion of settlement negotiations? Have there
6 been any settlement negotiations both for the entire
7 proceeding, but for various legal issues? Have there
8 been discussions about that? I think we encouraged
9 that at the last pre-hearing conference.

10 MR. MARQUAND: Your Honor, actually, we
11 addressed both of those. We have sent a couple, we
12 have sent two proposed stipulations to staff to try to
13 narrow down the factual matters and make it cleaner as
14 to what we're really presenting in terms of issues.
15 And that part, the staff is going to respond back to
16 us is my understanding.

17 With respect to resolution of the
18 proceeding itself, that subject has been broached, but
19 I don't believe either party has really sat down and
20 seriously -- we haven't had any serious discussions
21 along that line.

22 JUDGE YOUNG: Is what you've learned as a
23 result of discovery made that more possible than it
24 has seemed to be in the past, do you think?

25 MR. MARQUAND: I don't know. It certainly

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1 hasn't changed our view of the case.

2 MR. DAMBLY: We had a brief discussion and
3 I feel comfortable in saying I don't see any way in
4 the world this is going to settle before the hearings.

5 JUDGE YOUNG: That's what you said last
6 time. Obviously, if anything does develop in these
7 last discovery responses that would allow for
8 settlement of any part of the case, we encourage that.
9 Meanwhile, we have these legal issues that we had
10 discussed at the last, at both of our conferences
11 before. And I had encouraged that you could file
12 pre-trial briefs on that.

13 Have you discussed those issues any
14 further? Are you any closer together on them?

15 MR. MARQUAND: With respect to the legal
16 standard here, that we are not going to get closer
17 together. It's going to take a resolution by the
18 Panel. I think that the staff and TVA are
19 diametrically opposed on that particular legal
20 standard.

21 Am I right, Mr. Dambly?

22 MR. DAMBLY: I don't know if I would say
23 diametrically apart, but I feel very confident that we
24 don't agree on the standard in just about anything in
25 this case and it's going to take -- for that matter,

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1 Your Honors, even if we did agree, since this is a
2 case of first impression, you all are still going to
3 have to weigh in with what it really is.

4 JUDGE YOUNG: Just in terms of
5 characterizing the legal issues, in our order of
6 November 28th, we defined those as including the
7 definition of protected activities under 10 CFR
8 Section 50.7, the standard of proof in dual motives
9 cases, and the relevance of remedy case law under
10 subject.

11 Do either of you have anything that you
12 would like to add to this list or any way in which you
13 would suggest that the definition of the legal issues
14 be modified?

15 MR. DAMBLY: I guess, Your Honor, those
16 basically cover the issues. I think there will be
17 some side issues. I'm not sure the scope of protected
18 activity, I'm sure Mr. Marquand might disagree with
19 this, but I don't really think that's necessarily an
20 issue in this case. He clearly filed the complaint in
21 1993 and that is protected activity and was bound to
22 be so in his 1996 case by DOL.

23 So I mean that in and of itself puts the
24 protected activity issue, as far as I'm concerned, to
25 rest, but there's underlying, you know, actions he

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1 took which were also protected which led to the 1993
2 complaint. And we can discuss all of that. But I
3 don't think in this case, per se, that somebody can
4 make a legitimate argument that filing his complaint
5 in 1993 wasn't protected activity.

6 MR. MARQUAND: I don't disagree with that,
7 but --

8 JUDGE YOUNG: You disagree?

9 MR. MARQUAND: I don't disagree with the
10 fact or the argument that filing of DOL's cases,
11 protected activity is clearly what the statute,
12 Interview Reorganization Act says, is clearly what
13 50.7 deals with, but whether other matters that
14 happened constitute protected activity and whether or
15 not there was animus against him for certain things
16 that he did or didn't do is certainly, I think, the
17 crux of this case.

18 JUDGE YOUNG: Are --

19 CHAIRMAN BECHHOEFER: By the way from now
20 on before anybody speaks, could they identify
21 themselves? It will make it a little easier to make
22 out who's speaking.

23 JUDGE YOUNG: And that was Mr. Dambly and
24 then Mr. Marquand, right?

25 MR. MARQUAND: Yes, Your Honor.

1 MR. DAMBLY: Yes.

2 JUDGE YOUNG: Judge Young. So Mr. Dambly
3 went through a definition of the original filing and
4 then I think a second filing.

5 And Mr. Marquand, you indicated that you
6 agreed with that definition, but that the issue was
7 whether there was -- whether in effect -- let me see
8 if I understand what you said. In effect, whether
9 those protected activities were the cause of the
10 failure to promote Mr. -- what was his name?

11 CHAIRMAN BECHHOEFER: Fizer.

12 JUDGE YOUNG: Fizer.

13 CHAIRMAN BECHHOEFER: He was RIF'd,
14 essentially RIF'd.

15 MR. MARQUAND: Essentially, he resigned.
16 He flat out resigned.

17 CHAIRMAN BECHHOEFER: Okay.

18 JUDGE YOUNG: Okay, so I guess my question
19 is did I understand you correctly, Mr. Marquand, to be
20 saying that you agreed that Mr. Fizer engaged in
21 protected activities, in effect, the question is
22 whether those protected activities were the cause of
23 his not being promoted?

24 MR. MARQUAND: I certainly agree that his
25 filing of a 1993 Department of Labor complaint was

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1 protected activity. And you are correct that the
2 question is was that the motivation for not selecting
3 him or reorganizing the corporate organization in
4 1996. And if the staff is willing to stipulate that
5 that is a protected activity that they were relying
6 upon as the motivation for the adverse actions against
7 him, I think that that would go a long ways toward
8 simplifying this case.

9 JUDGE YOUNG: Mr. Dambly?

10 MR. DAMBLY: Your Honor, Mr. Dambly. I
11 think as is set forth in the Notice itself, it's the
12 filing of the complaint in 1993 and the actions which
13 led to the filing of the complaint in 1993, Mr.
14 Fizer's disagreements with Mr. McGrath and Mr.
15 McArthur on the NSRB issues. That's what it says in
16 the Notice of Violation and that's what we think are
17 the protected activities involved.

18 JUDGE YOUNG: So then Mr. Marquand, in
19 response to Mr. Dambly's inclusion of the earlier
20 activities, excuse me for rustling my papers, but I'm
21 trying to get the Notice in front of me.

22 (Pause.)

23 Mr. Marquand?

24 MR. MARQUAND: Yes ma'am, I'm here.

25 JUDGE YOUNG: I was just asking, you heard

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1 Mr. Dambly say that the Notice of Violation mentioned
2 earlier activities. Maybe Mr. Dambly, you can point
3 us to the particular -- are you thinking of the third
4 paragraph of the February 7th letter?

5 MR. DAMBLY: I am speaking of the Notice
6 of Violation itself which is the attachment to the
7 February 7th, I believe, and it says -- it has two
8 indented paragraphs which set forth what the violation
9 is. The first one talks about 10 CFR 50.7 prohibits
10 discrimination and the second one says contrary to the
11 above, TVA discriminated against Mr. Fizer,
12 discriminated position, etcetera. TVA took these
13 steps at least in part in retaliation for Mr. Fizer's
14 involvement in protected activities. Mr. Fizer's
15 protected activities included the identification of
16 chemistry-related nuclear safety concerns in 1991 and
17 1993 and the subsequent filing of Department of Labor
18 complaints in September of 1993 based, in part, on
19 these chemistry-related nuclear safety concerns.

20 JUDGE YOUNG: Thanks for pointing us back
21 to that.

22 Mr. Marquand?

23 MR. MARQUAND: Yes.

24 JUDGE YOUNG: You disagree that any of the
25 protected activities that are defined in the Notice

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1 that Mr. Dambly just read were protected activities?

2 MR. MARQUAND: Yes.

3 JUDGE YOUNG: Why don't you delineate the
4 ones that you disagree on and that that will at least
5 get us a little bit closer.

6 MR. MARQUAND: All right. What we have
7 never understood was what protected activities Mr.
8 Fizer engaged in that led up to his 1993 Department of
9 Labor complaint. OI's investigation of the 1993
10 complaint included --

11 JUDGE YOUNG: I'm sorry?

12 MR. MARQUAND: OI.

13 JUDGE YOUNG: OI, okay.

14 MR. MARQUAND: OI's investigation of the
15 1993 complaint concluded he had not engaged in any
16 protected activities. And when you read the complaint
17 the issues that were raised, the issues were ones
18 identified by other people that he was held
19 accountable for not fixing or not addressing. And his
20 1993 complaint was simply his plea that he shouldn't
21 be held accountable for managing the Chemistry
22 Department at Sequoyah. He disagreed with whether or
23 not he should be held accountable and responsible for
24 fixing long-standing chemistry problems and we have
25 never understood that he claimed to have been

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1 responsible for identifying those concerns or raising
2 those concerns to anybody's attention, but simply that
3 he disagreed with whether or not he should be held
4 accountable for fixing them or not fixing them. And
5 we have still -- I'm intrigued by counsel's statement
6 that they are still relying on that, a claim of
7 protected activity, given the discovery we sent to
8 them and the responses that we've received back. I
9 think we will have to have some further discussions
10 with counsel to elaborate upon what they're talking
11 about.

12 JUDGE YOUNG: Okay, so basically you agree
13 that the filing of the 1993 complaint was protected
14 activity. What you disagree about is that you contend
15 that the alleged identification of chemistry-related
16 nuclear safety concerns in 1991 through 1993, you
17 differ with Mr. Dambly that (1) that those occurred as
18 he said; and (2) that those were protected activities
19 as I understand you. Did I correctly summarize that?

20 MR. MARQUAND: There were certainly some
21 issues raised, but they weren't raised by Mr. Fizer.

22 JUDGE YOUNG: So you dispute that the
23 statement in the Notice of Violations was correct
24 factually and you dispute that those -- any such
25 activities were protected activities?

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1 MR. MARQUAND: To the extent that it
2 appears that the staff is claiming that that was the
3 animus or the causation for what happened in Mr. Fizer
4 in 1996, certainly.

5 JUDGE YOUNG: This may be something that
6 will require some briefing either before or after the
7 hearing and I guess maybe you could put that on hold
8 for a second and move to the other legal issues and
9 try to define all of them that are before us. I think
10 I asked before whether the summary of the legal issues
11 in the November 28th order encompassed all the legal
12 issues that you -- that both parties see in the case
13 and stated them correctly.

14 So there may be some briefing still
15 necessary around the collection of activities that
16 occurred in 1991 through 1993 prior to the filing of
17 the 1993 complaint.

18 Then with regard to the standard of proof
19 in dual motives cases and the relevance of remedy case
20 law on the subject, let's hear from you?

21 MR. MARQUAND: Let me, just so nobody is
22 surprised by this, but I think this -- I think I
23 alluded to this and that is whether or not the events
24 that occurred in 1991 through 1993 were the cause or
25 the proximate cause or whether there was a nexus

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1 between those and the adverse actions that happened in
2 1996.

3 And what I would like to make sure that
4 everyone is aware of is the legal issue we believe is
5 lurking in there, we don't think it's a very big issue
6 from the standpoint of difficult of dealing with, but
7 it is a big issue in terms of where the staff is going
8 and that is as we read the February 7, 2000 letter
9 which enclosed the Notice of Violation, the staff
10 apparently drew a conclusion that the earlier events
11 motivated the adverse action and according to them
12 they looked at the "temporal proximity" between the
13 dates that Mr. McGrath and Dr. McArthur assumed their
14 positions and the dates of the adverse actions. And
15 they relied upon that quote "temporal proximity"
16 between those events to draw a conclusion on inference
17 of discrimination.

18 We think that is an inaccurate application
19 of the law. The Supreme Court -- and we mentioned in
20 our last pre-hearing conference, the Supreme Court has
21 made it clear that what you measure in terms of
22 temporal proximity to a raised inference of
23 discrimination is between the date of the protected
24 activity and the date of the adverse action. And if
25 we're talking about protected activity, the latest of

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1 which occurred in 1993 and adverse action which is in
2 1996, there is not temporal proximity that would
3 support an inference to discrimination. We think that
4 the NRC staff's measurement between events they picked
5 is simply the wrong yardstick.

6 JUDGE YOUNG: So that would fall under the
7 standard of proof in these dual motives cases? Or how
8 would you characterize it? Because obviously --

9 MR. MARQUAND: It's not a dual motives
10 case question at all. It's a question of a prima
11 facie case and simply the normal McDonnell Douglas
12 type of cases. There's an inference of discrimination
13 based on the proximity in time between protected
14 activity and the adverse action.

15 CHAIRMAN BECHHOEFER: In short, you're
16 saying it's three years too long.

17 MR. MARQUAND: The Supreme Court which
18 used whether it was 18 months in its cited cases, or
19 whether it was just a few months difference and said
20 that's too long to support such an inference. Three
21 years is way too long.

22 JUDGE YOUNG: Mr. Dambly, let me just ask
23 your response in terms of -- is that the limit of what
24 you're relying on?

25 MR. DAMBLY: This is Mr. Dambly. No, Your

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1 Honor, I think that's a mischaracterization of what the
2 staff -- again, the staff is dealing with what is said
3 in the Notice of Violation, not what everybody would
4 like to read into everything else.

5 The temporal proximity -- we are not
6 saying you filed a complaint in 1993 and therefore in
7 1996 they discriminated against him. We're sending
8 the underlying protected activity in 1993 which
9 evidenced animus which led to the 1993 complaint when
10 those same supervisors got the chance, first thing
11 they did was and after making many statements which
12 referred to the questions of discovery about we've got
13 to get this guy out of here, we have to fire him.
14 They took steps to assure that at their first
15 opportunity they could eliminate Mr. Fizer.

16 JUDGE YOUNG: But you're not relying
17 simply on temporary proximity?

18 MR. DAMBLY: We're relying on the
19 statements and animus expressed by the specific
20 individuals involved. The only temporary proximity is
21 within a short time of them being back in his chain
22 which they weren't in as a result of the settlement in
23 the 1993 case, they took actions to again eliminate
24 him from his position. That's the only temporal.

25 MR. MARQUAND: Your Honor, I was

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1 specifically referring to the first complete paragraph
2 on page 3 of the February 7, 2000 letter and it says
3 as Mr. Dambly states, the temporal proximity between
4 the appointment of these individuals as his
5 supervisors was with respect to Mr. McGrath in late
6 1995 and Dr. McArthur in spring of 1996, nonselection
7 in July of 1996 and relied upon one other thing they
8 said, disparate treatment of Fizer with respect to the
9 position led the NRC to conclude that the reasons for
10 his nonselection were pretextual and we think that the
11 measurement that they have selected for that temporal
12 proximity is as a matter of law incorrect.

13 JUDGE YOUNG: Okay, Mr. Marquand, let me
14 just say two things. First, in trying to define what
15 these legal issues are, my purpose in doing that is to
16 try to simplify the issues as much as possible and get
17 us all on the same page, not to open up argument on
18 the case because obviously in deciding the case we're
19 going to have to apply various laws to the facts that
20 come out at the hearing.

21 And I sort of hear what you're doing as,
22 in effect, arguing your case. On this whole temporal
23 proximity issue, I guess I'm not really following you
24 because I read the sentence in that paragraph that you
25 referred to in the February 7th letter as referring to

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1 the appointment of two individuals in 1996 and
2 nonselection later in 1996.

3 You can correct me if I'm wrong, but I
4 guess what I'm trying to do is since there has been
5 some discussion about the possibility of motions for
6 summary judgment and since these legal issues have
7 been sort of hovering around since we first met with
8 you all on the case, and since we have discussed the
9 possible desirability of briefing these legal issues
10 prior to the hearing, rather than getting into arguing
11 the case and your different points of view on how
12 various laws should be applied, what I'm trying to get
13 you to do is define what the legal issues are, not the
14 outcome, not the -- how they should be applied to the
15 facts.

16 And with regard to the protected
17 activities, it seems to me that there is a
18 disagreement between the parties on whether the
19 activities prior to the 1993 filing of the complaint
20 were themselves protected activities and that would be
21 one legal issue that may or may not be susceptible to
22 easy resolution in terms of what is the standard, what
23 is the definition of protected activities that we need
24 to apply to those facts to determine whether those
25 1991 through 1993 activities were -- could fall under

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1 the legal definition of protected activities.

2 Then the other primary issue that I recall
3 us discussing in the times we've met is the issue of
4 what is the standard to apply in so-called dual
5 motives cases and then there were -- I believe the
6 early discussion on that had to do with and I'm --
7 correct me if I'm wrong here, but it had to do with
8 whether the person would have been terminated anyway
9 despite their having been some partial motivation
10 based on protected activity and I think that I recall
11 that some of the law on that had to do with the remedy
12 in Title 7 cases and there might be a question on
13 whether that remedy case law was applicable in the
14 context of the case like this. I believe Mr. Dambly
15 had argued that it would not be since the issue of the
16 remedy to Mr. Fizer is not an issue in this case. The
17 only issue in this case is the penalty against TVA for
18 allegedly making the decision on the promotion based
19 completely or in part on the protected activities of
20 Mr. Fizer.

21 So that's why we defined those legal
22 issues as we did and I think that it would help
23 everyone and probably simplify the proceedings if
24 everyone can at least agree on what is the law that we
25 are to apply and then the issue of how it's applied to

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1 the particular facts is somewhat more clear.

2 CHAIRMAN BECHHOEFER: If you disagree on
3 some of these legal questions, we're going to ask you
4 to brief that, I believe.

5 JUDGE YOUNG: Right. The question we want
6 to get them to address was -- that sort of exposition
7 of the legal issues that I went through, was that an
8 accurate characterization of our previous discussions
9 and are the legal issues that we need to look at in
10 this case.

11 MR. MARQUAND: Your Honor, I think that's
12 fair and I apologize if I gave the impression that I
13 was trying to argue our case. I simply wanted to
14 alert the Board that I felt that the issue of what the
15 proper measurement of temporal proximity was an issue
16 and I didn't want anybody to be surprised when we put
17 that into our brief on summary judgment.

18 JUDGE YOUNG: Okay, well, then let's add
19 temporal proximity as an additional legal issue to the
20 other three.

21 Mr. Dambly, with that added in and also
22 feel free to correct me if I'm misstated any of the
23 other legal issues, what say you about that list of
24 legal issues?

25 MR. DAMBLY: I don't have a problem with

1 the list of legal issues, Your Honor. I think I would
2 have stated the remedy stuff different. The staff's
3 position is if you look at Section 211 it sets forth
4 what constitutes a violation specifically and if
5 protected activity was a factor in the action, there
6 is a violation. It goes on to say what the standard
7 is for a remedy and as you recall, when we had our
8 first discussion, pre-hearing conference, I also
9 mentioned that the 1991, as I recall, the Title 7 was
10 specifically amended to overturn the PriceWaterhouse
11 case and set forth that if discrimination is a factor
12 in an action, then that is a violation and whether
13 there are other legitimate reasons go to remedy.

14 JUDGE YOUNG: You explained that better
15 and I thank you for doing that. And I think that's
16 really sort of -- that gets to the nub of the -- this
17 whole issue of if TVA -- I guess what it gets to is if
18 we can resolve that issue, then the relevant
19 information on the -- how do I put it? The reasons
20 that TVA might have had for terminating or for not
21 promoting Mr. Fizer that were not related to protected
22 activities based on possibly less significance. Now
23 I'm not sure whether you can separate those out.

24 Do you think that those can be separated
25 out? I guess maybe I'm hearing Mr. Marquand saying

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1 that your contention is or that's a term of art in
2 these cases, so let me change that word. Your
3 argument is that action was in no way based on
4 protected activities. Is that correct?

5 MR. MARQUAND: That's correct, Your Honor.
6 We don't -- John has mentioned to me, he says why are
7 we talking about dual motives and I said well, that's
8 only push comes to shove. We don't think in the first
9 instance that a prima facie case can be made of any
10 sort of discriminatory animus. We don't think that
11 there's any evidence out there that what happened in
12 1996 was motivated by anything other than legitimate
13 management concern about how to structure the
14 organization.

15 JUDGE YOUNG: Well, let me ask you this
16 question. If the evidence were to lead us to conclude
17 that there were mixed motives, would you then want to
18 then make an argument to us that even if the decision
19 was based in part on some animus that remained from
20 these whatever earlier protected activities may have
21 taken place, at least the filing of the complaint,
22 would you argue that even if that was partially the
23 motive, there were other good grounds to choose a
24 person who got the position in question such that we
25 would need to look at that law because I know that

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1 that law is out there. And if we don't need to deal
2 with it, that's fine, but it seems to me that there's
3 at least a possibility that we might.

4 MR. MARQUAND: Yes, Your Honor, you're
5 correct. That's an even-if argument and we would make
6 that argument, if necessary, but we don't think that
7 we're going to get there.

8 JUDGE YOUNG: Okay, it strikes me that
9 there's at least a likelihood that you may make that
10 argument later, so I guess then the question becomes
11 is it -- would it help us significantly having talked
12 at some length in all of our conferences about these
13 legal issues, and maybe getting each time a somewhat
14 better handle on them, would it help significantly to
15 brief them in advance of the hearing or would it be
16 simpler to go straight to the hearing and then brief
17 them in proposed findings of fact and conclusions of
18 law?

19 And the second part of that question is
20 does either party anticipate wanting to file any
21 motions for summary disposition and by asking that I'm
22 not in any way encouraging it, because I tend to
23 believe that unless facts are just absolutely clear
24 which they do not appear to be here, there appear to
25 be a lot of differences in disputes on the facts,

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1 absent a lack of such dispute, motions for summary
2 judgment are generally not an efficient way to proceed
3 in a case like this.

4 MR. DAMBLY: Your Honor, Dennis Dambly
5 from staff. I certainly think we should brief the
6 legal issues beforehand; but only to the extent that
7 the Board would be willing to rule on the proper
8 standards before the hearing because otherwise we
9 haven't gained a whole lot.

10 JUDGE YOUNG: But you see briefing at this
11 point prior to the hearing?

12 MR. DAMBLY: I think we can brief what
13 you've set out, what's the scope of protected
14 activity, what would be the standard of proof in a
15 case like this, be it dual motive or pretext case, and
16 in the event I think the last issue that you brought
17 up, in the event that the Board were to find that this
18 is a mixed motive case or that at least the protected
19 activity played some part in the decision to
20 ultimately -- which ultimately resulted in Mr. Fizer
21 not being employed there, can they overcome that with
22 a showing they would have done the same thing anyway
23 because that would change whether there was a
24 violation or is that just effect. Irrelevant, in our
25 case, because of the fact that we're not looking for

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1 a remedy for Mr. Fizer. This is a question of whether
2 they violated our regulation prohibiting them from
3 taking that into account, not whether they had a good
4 reason also, so Fizer shouldn't recover anything. As
5 I said, I believe both that DOL in this Title 7 case
6 law which says it's a violation and I think once you
7 get to the violation stage, the inquiry is over.

8 JUDGE YOUNG: You may be right. But let
9 me ask you, how would it help, how would it make the
10 hearing more efficient to resolve these legal issues
11 in advance? I'm beginning to think that it would
12 actually -- there might be a great likelihood that it
13 would cause some delay by requiring us to make rulings
14 on legal issues in the absence of a factual context
15 when so much of this case seems to -- so much of this
16 case depends on actual facts that come out.

17 In other words, a lot of the law is based
18 on particular factual situations and until all the
19 facts are out, we make our factual findings. How
20 would it help to brief or decide any of the legal
21 issues in advance? Would it really foreclose the
22 presentation of any facts?

23 MR. DAMBLY: I would think, Your Honor,
24 that the only issue that would foreclose or be a
25 benefit to deciding up front is, if you will, the

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1 mixed motive remedy issue.

2 If the Board were to decide and rule that
3 if we can show, we the staff, can show that protected
4 activities was at least, in part, responsible for the
5 actions taken against Mr. Fizer, if that's the end of
6 the inquiry, then I think you could shorten the
7 hearing somewhat without having to deal with issues
8 and arguments about well, they had good reasons also,
9 the standard that would be applied to the remedy stage
10 in a DOL or Title 7 case. If all we're going to deal
11 with is the violation and again the staff certainly
12 thinks that's what we're going to deal with. That's
13 an issue that's going to have to be resolved and it
14 may have an impact on the hearing. We can wait until
15 after the hearing to brief it --

16 JUDGE YOUNG: Let me just finish up this
17 line of questioning. What I hear Mr. Marquand saying
18 is that they are going to present the same proof no
19 matter what because they're not agreeing with you that
20 this is a dual motive case. Their argument is that
21 there was no discriminatory motivation and so they're
22 going to want to put on all the facts and the issue of
23 whether there's a dual motive only arises if we, in
24 our fact finding, determine that there was a dual
25 motive. So I guess at this point I'm not seeing how

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1 briefing it in advance would really be that much help.
2 It's pretty clear that the issue of whether --

3 CHAIRMAN BECHHOEFER: Wait a minute,
4 you're not speaking for the Board now. I feel
5 differently.

6 I'd like to say that I would like to see
7 prior to the hearing at least pre-trial briefs on what
8 the parties view as the outstanding legal question.
9 Similar to what was earlier talked about in terms of
10 a motion for summary disposition, I would just like to
11 see briefs beforehand, before we get to the hearing so
12 that we know what the parties -- what's motivating
13 each of the parties.

14 JUDGE YOUNG: Are you suggesting we rule
15 on those?

16 CHAIRMAN BECHHOEFER: No, I am not
17 suggesting that. I'm not sure we should rule on them.
18 I think we need them for our education so that these
19 things don't vary that much and that's why I would
20 like, personally at least, to see pre-trial briefs, if
21 not stipulations of fact as well, if to the extent you
22 can agree on certain facts, that would be useful too.

23 And I was going to suggest that they be
24 filed by say March 1st, both, but at least the briefs.

25 MR. MARQUAND: This is Brent Marquand of

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1 TVA. In our previous pre-hearing conferences we had
2 raised the issue of filing a motion for summary
3 judgment. Our view of that matter is still the same.
4 There are some factual matters out there which we do
5 not view as any genuine issue of dispute with respect
6 to them and we would still like the opportunity to
7 brief that.

8 We would be happy to brief these legal
9 issues at the same time so that the summary judgment
10 briefs can serve both a dual purpose of the motion of
11 summary judgment, as well as trial briefs. We have
12 sent two proposed stipulations to the staff with the
13 hopes that we can provide the Board with some
14 undisputed facts that the case is based on as well as
15 the procedural posture of the case and we think that
16 that is a very orderly way to proceed in this case.

17 CHAIRMAN BECHHOEFER: What I'm not certain
18 is that the Board could rule on the legal questions
19 before the hearing.

20 JUDGE YOUNG: We need to rule on motion
21 for summary judgment though.

22 CHAIRMAN BECHHOEFER: We don't. We don't
23 even have to accept such motions, entertain such
24 motions and I would rather decline to even entertain
25 it.

1 MR. DAMBLY: Your Honor, I would support
2 that. This is Mr. Dambly. I still have no idea where
3 Mr. Marquand is coming from. They filed a motion for
4 summary disposition on the same case in DOL back in
5 1996 and lost it and certainly the factual disputes
6 become even greater as a result of discovery that's
7 been undertaken in this case. I don't know how
8 anybody with a straight face could suggest they could
9 file a motion that would be so clear and unambiguous
10 on all the facts that you could rule in their favor.
11 In fact, in the discovery we've had, it would be the
12 staff and the staff doesn't intend to file one.

13 CHAIRMAN BECHHOEFER: Well, I was just
14 thinking of an exposition of outstanding legal issues
15 before we get to the hearing which will help us
16 understand to some extent where each party is coming
17 from. That I think would be useful for the staff. I
18 would not anticipate that we would rule on summary
19 disposition because you probably -- there probably
20 will be outstanding questions of fact that are not
21 resolved.

22 MR. MARQUAND: Your Honor, we are in court
23 all the time and we understand the procedure for
24 summary judgment. We understand that if, in fact,
25 they're arguing issues of fact that would preclude the

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1 ruling on the motion, we would understand that there
2 would be a necessity to go to trial.

3 All we're asking for is the opportunity to
4 provide that to the Board. I think that the Board's
5 procedures, the NRC's procedures certainly allow for
6 that for summary disposition and for filing of motions
7 where there are no genuine issues as to the material
8 facts. But all we're requesting is the opportunity to
9 brief those issues and we understand that if the Board
10 thinks that there are some genuine issues of truly
11 material facts, then we would go to a hearing, but
12 we're just asking for the opportunity to proceed along
13 those lines and to brief the relevant issues at the
14 same time.

15 CHAIRMAN BECHHOEFER: Okay, let us go off
16 the record for a moment and we'll be back.

17 (Off the record.)

18 CHAIRMAN BECHHOEFER: Back on the record.
19 Is everybody still there?

20 MR. DAMBLY: Yes, Your Honor.

21 MR. MARQUAND: Yes.

22 CHAIRMAN BECHHOEFER: The Commission
23 policy statement 48 NRC 18, but it's at page 20,
24 that's COI 98-12, policy on conducting adjudicatory
25 proceedings, it says that Board should forego the use

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1 of motions for summary disposition except upon a
2 written finding that such amotion will likely
3 substantially reduce the number of issues to be
4 decided or otherwise expedite the proceeding.

5 The Board believes that the filing of
6 motions for summary disposition in the circumstances
7 here would not be useful, but if anybody objects to
8 that they can let me know. We do think legal briefs
9 would be useful.

10 Any comments on that? And we would set a
11 date for pre-trial briefs or -- and possibly
12 stipulations of fact to the extent you can agree by
13 say arbitrarily now March 1st.

14 The dates are subject to modification.

15 JUDGE COLE: We are suggesting March 1st.

16 CHAIRMAN BECHHOEFER: We are suggesting
17 March 1st and we're also suggesting that the hearing
18 take place starting April 23rd, but these dates are
19 all subject to negotiation as to convenience and that
20 type of thing. So do you first -- would the parties
21 desire to file motions for summary disposition or
22 rather just have -- file briefs on the legal issues.

23 MR. MARQUAND: Your Honor, we are still of
24 the opinion and desire to file a motion for summary
25 judgment. If this Board would entertain it, we would

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1 like to file one. And we understand that it might not
2 be granted and that the Board might not be able to
3 rule on it, but we think there are certainly some
4 issues out there, possibly the whole case is
5 susceptible to it.

6 CHAIRMAN BECHHOEFER: Would that be true,
7 by the way, would those issues be highlighted by the
8 filing of pre-trial briefs?

9 JUDGE YOUNG: Mr. Marquand, let me ask you
10 to direct your response to do you have an actual
11 objection to the Board deciding that there would be no
12 motion for summary disposition permitted?

13 MR. MARQUAND: An objection? We don't
14 have the policy here. I understand what you're
15 saying, but until the Board -- all the Board has had
16 is some oral representations by the parties as to
17 generalities about the case. We don't understand how
18 the Board without looking at the specifics that we
19 would raise could decide the motion for summary
20 judgment would not be productive.

21 CHAIRMAN BECHHOEFER: If there are any
22 disputed factual issues, the Board presumably couldn't
23 grant such a motion.

24 MR. MARQUAND: I understand that.

25 CHAIRMAN BECHHOEFER: So why would not the

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1 filing of pre-trial briefs and perhaps pre-trial
2 stipulations of the facts you do agree on serve the
3 same purpose and which would apprise us at least of
4 where your differences are, the parties would file
5 obviously.

6 MR. MARQUAND: I certainly agree a
7 pre-trial brief and a summary judgment brief would
8 educate the Board as to where the parties' positions
9 are and also as to what was not in dispute if a trial
10 was necessary, but a motion for summary judgment is
11 designed to pre-prevent the necessity for a hearing
12 and although I like Chattanooga in the early
13 springtime, I don't see a need to have a hearing, if
14 in fact a summary judgment is appropriate.

15 JUDGE YOUNG: Mr. Marquand, obviously, if
16 summary judgment is appropriate it would foreclose the
17 need for a hearing. I think what's happening at this
18 point is that based on some language of the Commission
19 is COI 98-12, the cite for which was given to you a
20 moment ago, namely the language that Board should
21 forego the use of motions for summary dispositions
22 except upon a written finding that such a motion will
23 likely substantially reduce the number of issues to be
24 decided or otherwise expedite the proceeding.

25 Based on that, I think is where Judge

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1 Bechhoefer's statement that we might not entertain any
2 motions for summary disposition comes from and what he
3 was asking for is whether you wanted to make a formal
4 objection to, in effect, the Board's denying your
5 request to file such a motion.

6 If you have an objection, then that would
7 be something that you could make argument on and we
8 could take under advisement and make a ruling on and
9 obviously if you have an objection to the denial of
10 your desire to file a motion for summary judgment that
11 would need to be done too.

12 MR. MARQUAND: Yes, Your Honor, I
13 understand. I appreciate that. The language you read
14 to us in COI 98-12 sounds to me to be very similar to
15 a law that's applicable in federal court with respect
16 to summary judgments, that is, if it's not going to
17 save the court any time or the parties any time,
18 there's really no need to rule upon it and entertain
19 such a motion.

20 However, where a motion for summary
21 judgment will streamline the case or even obviate the
22 necessity for a hearing, a court does entertain such
23 a motion and I guess what we're looking at, how could
24 the Board make a determination without seeing the
25 motion, without looking at the evidence that the

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1 parties wish to present the Board with respect to that
2 motion, how could the Board make a determination that
3 such a motion would not be any interest to judicial or
4 administrative economy?

5 JUDGE YOUNG: Mr. Marquand, I think that's
6 what is happening is based on everything that we've
7 heard, it's becoming apparent to us that you all are
8 opposed to each other on just about everything in this
9 case including the facts and the inferences to be
10 drawn from those facts.

11 In ruling on a motion for summary judgment
12 or summary disposition, if there are differences in
13 the inferences to be drawn from particular facts, then
14 summary disposition is not appropriate. And based on
15 that and the degree of contentiousness in this case,
16 in terms of the facts and not in terms of how the
17 lawyers are asking all very polite and appropriate,
18 but in terms of the differences between the parties,
19 it seems to us that summary judgment is probably not
20 something that would be the most efficient way to
21 proceed in this case.

22 In terms -- but what I guess I was asking
23 you to address yourself to is the issue of whether you
24 believe you have a right to file such a motion and I
25 guess we want to hear from Mr. Dambly too on that. If

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1 there's an objection to the Board, in effect, denying
2 you the quote right to file a motion for summary
3 disposition.

4 MR. MARQUAND: May we, Your Honor, say
5 have a week to consult with our client to decide if we
6 wish to file such an objection and then file a formal
7 written objection if we so desire? Other than if we
8 make that oral representation now without consulting
9 with our client?

10 CHAIRMAN BECHHOEFER: Right, we were going
11 to also, however, set some dates for filing pre-trial
12 briefs with the understanding that the dates we set
13 today may have to be modified, if we -- if you decide
14 to go the summary disposition route because that will
15 inevitably delay the set of any hearing if a hearing
16 is to take place. So I guess we would entertain
17 during the next week any objections to our
18 determination which we'll make today that use briefs
19 rather than -- pre-trial briefs rather than motions
20 for summary disposition. But if you formally object,
21 and I guess we would give you a week -- that would be
22 until the 16th, am I guessing right?

23 JUDGE YOUNG: Right. So that would give
24 you until January 16th to file any formal objection to
25 the Board's objection to use pre-trial briefs in lieu

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1 of any motions for summary judgment and I would
2 suggest that if you file any such objections you at
3 least give enough of what you would include in such a
4 motion that you would be able to demonstrate to us
5 that in addition to your right which we would want you
6 to address, we would have some idea of why you think
7 that summary judgment would be appropriate which is a
8 separate issue from your right.

9 Does that make sense?

10 MR. MARQUAND: Yes, Your Honor.

11 JUDGE YOUNG: Okay, and if the staff would
12 have any response to that, week after that, January
13 23rd?

14 MR. DAMBLY: No problem, Your Honor.

15 JUDGE YOUNG: Do you want to weigh in on
16 this, Mr. Dambly since you haven't said anything in
17 this discussion?

18 MR. DAMBLY: Not really. As I said
19 earlier, I do believe it's a waste of everybody's
20 time. They lobbed a motion on the same case in the
21 Department of Labor and the facts haven't changed
22 since then that would somehow entitle them to be
23 granted summary disposition in this case. So I don't
24 know why they think and given what we heard during
25 deposition but I don't want to get into that stuff

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1 because it's not appropriate at this time, but there
2 are certainly factual issues and in a case where the
3 whole question is motivation, who knew what, when,
4 where, and we're not going to be stipulating to the
5 same facts as they would, I don't see how one could
6 ever grant one in this case.

7 JUDGE YOUNG: The other issue that I was
8 asking if you wanted to weigh in on was whether TVA
9 had a right to file a motion, just simply a right to
10 file it. Not the merits of whether it's appropriate.

11 MR. DAMBLY: I would need to do some
12 research. It would appear to me, Your Honor, from
13 looking at the regs that it does give them the
14 opportunity to file it. But I don't know, the
15 Commission has --

16 CHAIRMAN BECHHOEFER: The Commission
17 policy to which I referred, can we give that any
18 weight at all?

19 MR. DAMBLY: I don't know if we can give
20 it weight over the regulation itself, but as I said,
21 I'd want to look into that.

22 JUDGE YOUNG: These are the kind of
23 concerns that lead us to make sure that we give Mr.
24 Marquand and TVA an opportunity to object to any
25 foreclosing of a right to file such a motion. So we

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1 set the deadlines for that. Do you want to go on --

2 MR. MARQUAND: Your Honor, before we
3 proceed, could you give me the citation? I think you
4 mentioned a Federal Register citation to COI 98-12?

5 JUDGE YOUNG: It's at 48 NRC and the
6 beginning of the case is page 18 and it's on the
7 bottom of page 20.

8 MR. MARQUAND: 48 NRC 20?

9 CHAIRMAN BECHHOEFER: It starts at 18, but
10 the section on the policy statement starts at page 20.

11 JUDGE YOUNG: There may be a reference to
12 the Federal Register cite somewhere in here, but I
13 don't see it right off the top --

14 CHAIRMAN BECHHOEFER: I don't know if they
15 published it there or not.

16 JUDGE YOUNG: They probably did, but I
17 don't know. In any event, we want to make sure that
18 to the degree that you have any right to file, you
19 have full opportunity to convince us of that and if
20 you do, then that would require reconsideration --

21 CHAIRMAN BECHHOEFER: We have proposed to
22 adopt a schedule today, we could reconsider that if we
23 decide that summary disposition is appropriate. I
24 think we should adopt a schedule. I think that's
25 important.

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1 MR. DEWEY: If you want to look it up in
2 the Federal Register, it's July 28, 1998.

3 CHAIRMAN BECHHOEFER: Okay. Lee Dewey
4 says that it's July 28, 1998, Federal Register.

5 JUDGE YOUNG: We had some other dates for
6 filing of pre-trial stipulations of fact and briefs,
7 namely March 1st and then as Judge Bechhoefer said we
8 were looking at starting the hearing on April --

9 CHAIRMAN BECHHOEFER: April 23rd which is
10 a Tuesday, 23rd to 26th. Whether that's enough time
11 or not, I don't know. We could come back the
12 following week. Nor do I know what plane schedules
13 are down to where the hearing site will be.

14 JUDGE YOUNG: What does that week look
15 like for you all in terms of your schedules and also,
16 I'd like to hear from both of you how long you think
17 a hearing will take?

18 MR. DAMBLY: Your Honor, Dennis Dambly for
19 the staff. The week of April 23rd or starting on the
20 23rd is fine with us.

21 CHAIRMAN BECHHOEFER: Tuesday. I presume
22 we fly down on Monday.

23 MR. DAMBLY: I would presume I'd be down
24 there before that. It doesn't really matter to me if
25 we start Monday or not since we have witnesses down

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1 there, Mr. Fizer and others, that we would certainly
2 want to talk to beforehand. But putting that aside,
3 my estimate would be two to three weeks to try this
4 case, based on everything that's been going on with
5 the depositions. I don't see it anywhere coming close
6 to finish this in three days or four days.

7 CHAIRMAN BECHHOEFER: Four days.

8 JUDGE YOUNG: Mr. Marquand, what about
9 you?

10 MR. MARQUAND: I can be available
11 beginning April 23rd until we conclude.

12 CHAIRMAN BECHHOEFER: Okay, so that if we
13 pre-schedule something for April 29th through May 3rd,
14 the following week, when we obtain our hearing space
15 and all that, we should anticipate that the hearing
16 would require at least two weeks.

17 JUDGE YOUNG: Well, since he's saying
18 three weeks, I certainly discourage that, but since
19 Mr. Dambly did say that, we might want to set aside at
20 least through May 9th and then what I was going to say
21 earlier is once we get this down I think we need to
22 make every effort to avoid extending it and so let's
23 say we were to rule that just for argument sake we
24 were to rule that TVA did have a right to file motion
25 for summary judgment, I think we would still want to

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1 get such a motion probably prior to the pre-trial
2 stipulations of facts so that we can get a response to
3 any such motion by March 1st and not delay in our
4 schedule otherwise. Does that sound workable to you,
5 Mr. Marquand?

6 CHAIRMAN BECHHOEFER: If we have summary
7 disposition, we're not going to make this schedule.

8 JUDGE YOUNG: Well, I am suggesting we do
9 make the schedule if we allow it.

10 Mr. Marquand?

11 CHAIRMAN BECHHOEFER: I think you've got
12 to allow six weeks for summary disposition, more or
13 less.

14 JUDGE YOUNG: Mr. Marquand, do you think
15 you could manage that if we were to rule in your favor
16 that you had a right to file a motion?

17 MR. MARQUAND: That I could make a final
18 motion by what date?

19 JUDGE YOUNG: That you could file a motion
20 by say -- well, it's normally 10 days to respond to a
21 motion?

22 CHAIRMAN BECHHOEFER: Not summary
23 disposition.

24 MR. MARQUAND: I think the schedule
25 regulations provide for 20 days to respond and of

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1 course, we certainly -- we don't object to a longer
2 period of time, if necessary.

3 JUDGE YOUNG: A longer period of time
4 meaning?

5 MR. MARQUAND: I mean it wouldn't stop if
6 they need to respond, we're not going to object to
7 what they think they need --

8 JUDGE YOUNG: What I'm trying to do is see
9 if there's any way should we allow you to file a
10 motion that you could file that relatively early, some
11 time in early to mid-February such that the staff
12 could respond by March 1st and we could stay on
13 schedule?

14 Is that doable, do you think?

15 MR. MARQUAND: Well, if -- depending on
16 when the Board decides that -- could make the decision
17 to allow us to do that, we're going to need to some
18 time to put it together. To say early February, I
19 think would be a little ambitious. Our earlier
20 discussions had been March 1. We could certainly beat
21 before that, but not a whole lot before that.

22 JUDGE YOUNG: Okay. Again, just on the
23 merits of it, at this point we discourage your filing
24 anything unless you really are pretty certain that
25 there's absolutely no dispute on the facts or the

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1 inferences to be drawn from them, but we set the
2 deadline for filing of objections. Maybe we can just
3 have a status conference some time early in February
4 to sort of see where we are on that and on everything
5 else and see whether we could keep our schedule, which
6 ever way it turns out we're going at that point.

7 CHAIRMAN BECHHOEFER: I don't think we can
8 possibly -- motions for summary disposition -- we have
9 to have enough time to act on them too, so I don't
10 think we can keep the -- okay.

11 Assuming the pre-trial briefs are filed on
12 March 1 and to the extent possible, pre-trial
13 stipulations of fact, under the schedule that we're
14 proposing, a list of proposed witnesses would be
15 filed, we suggest by March 29 and that would include
16 brief exposition of the testimony if you know that or
17 if you have that available, but not pre-filed
18 testimony in any event, but just a list of proposed
19 witnesses.

20 And on the same day, filing a list of
21 documents to be used at least in your direct
22 testimony, but if you know on cross examination as
23 well, and the same day would be March 29. Now any
24 problems with that?

25 MR. MARQUAND: We have no problems with

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1 that.

2 MR. DAMBLY: Your Honor, Dennis Dambly for
3 the staff. We don't have any problems. I guess the
4 one comment I'd make, I assume that should there be an
5 allowance of a motion for summary disposition, the
6 response to that, between the motion and the response,
7 we're then eliminating pre-trial briefs.

8 JUDGE YOUNG: Let us confer for a minute
9 on that.

10 MR. DAMBLY: Okay.

11 (Off the record.)

12 JUDGE YOUNG: We have changed our course
13 a little bit. We are not going to deny your right to
14 file a motion for summary disposition, Mr. Marquand.
15 If you want to file any motion for summary disposition
16 the deadline for that would be February 1st, but you
17 have from now until then to do that.

18 And then any response or if you file one,
19 the response deadline would be February 20th. And
20 then keep all the other dates the same except that
21 ending the hearing would have to be by May 9th and
22 again, I certainly encourage us to move that along
23 more quickly. I don't know that we really will need
24 three weeks. May 9th will be the last day, assuming
25 we were to need that third week.

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1 Does that -- any responses to what I've
2 just said?

3 MR. DAMBLY: Your Honor, Dennis Dambly for
4 the staff. The only question is the one that I had
5 before. If they file a motion for summary judgment
6 which I assume would include legal arguments,
7 etcetera, and we respond to that, do we still have a
8 pre-trial brief on March 1st or will we have taken
9 care of that as part of the --

10 JUDGE YOUNG: We are going to leave that
11 deadline in there for two reasons. One, if no motion
12 for summary disposition is filed, it's still there.
13 Second, if a motion for summary judgment only
14 addresses certain issues and not other issues, I think
15 Judge Beckhoefer, you require legal issues to be
16 briefed?

17 CHAIRMAN BECHHOEFER: That's correct.

18 JUDGE YOUNG: And if you've already done
19 them in your motions and responses, all you need to do
20 is basically reformat them so we don't see that that
21 would create a whole lot of burden on any one.

22 Any other responses to the dates that
23 we've set or the course that we've proposed here?

24 CHAIRMAN BECHHOEFER: Essentially that's
25 March 29th for proposed witnesses and lists of

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1 documents that you propose to use. That's lists. You
2 don't have to send copies. We'll see the copies when
3 we get there.

4 MR. DAMBLY: The staff has no objection to
5 those dates.

6 MR. MARQUAND: I don't have any problem
7 with those dates, but I would assume that to the
8 extent the parties haven't already provided those
9 documents to the other side that they would do so at
10 that time?

11 CHAIRMAN BECHHOEFER: Yes. I think that's
12 correct.

13 MR. MARQUAND: And since we're talking
14 about procedural matters for the hearing, would the
15 Board procedurally like a complete set of our exhibits
16 prior to the hearing, one for each of the Board
17 Members? How would you like to proceed on that?

18 JUDGE YOUNG: I think that would be
19 helpful.

20 CHAIRMAN BECHHOEFER: Do we want it up
21 here or do we want it just presented to us when we get
22 there?

23 MR. MARQUAND: I think they'll be
24 voluminous. Maybe the thing for us to do would be to
25 have them bound and tabbed and indexed and have them

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1 available to you when we begin the hearing.

2 JUDGE YOUNG: The other thing I guess I
3 would suggest with regard to --

4 CHAIRMAN BECHHOEFER: I would think that's
5 preferable.

6 JUDGE YOUNG: The other thing I would
7 suggest with regard to the exhibits is -- and part of
8 this is a question, to what degree do you think you
9 are going to have any objections to each other's
10 exhibits because the only -- well, I suppose the bound
11 versions could just be for us and you'd have formal
12 separate copies for entry into the record, assuming
13 there were any objections we needed to rule on with
14 regard to particular exhibits. To the degree that we
15 can make those stipulated exhibits, at least agreeing
16 to their admissability and authenticity, we would
17 encourage that and possibly if you have differing
18 views on some, you might separate those out and put
19 them in a different binder.

20 Does that make sense?

21 MR. MARQUAND: I understand. I really
22 don't know at this point, obviously, what staff is
23 going to offer so I can't tell you to what extent we
24 would object.

25 JUDGE YOUNG: We would encourage you to

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1 try to communicate as much as possible to narrow these
2 things down and since your deadline for filing
3 pre-trial stipulations is March 1st, that in your
4 discussions of that you also include discussions of
5 the exhibits as much as possible, and obviously,
6 there's a continuing duty to update any discovery. I
7 think we're going to need to wrap up because one of us
8 needs -- has another appointment.

9 CHAIRMAN BECHHOEFER: Are there
10 suggestions for a place for holding a hearing or
11 should we just -- we could call and arrange --

12 MR. MARQUAND: Your Honor, we've done a
13 lot of Department of Labor cases down there and
14 typically what they have done and they've received
15 good cooperation, is they talk to the head of the
16 federal courts down there and they frequently allow
17 them to use a bankruptcy court room or a spare
18 courtroom which certainly is conducive to this type of
19 proceeding.

20 JUDGE YOUNG: Mr. Dewey has gotten up
21 courtrooms in other places in federal courthouses, so
22 I think that's a good idea and we'll see if he can
23 arrange for something like that for us.

24 MR. MARQUAND: The federal court down
25 there, there's a building with a federal court in it

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1 and there's a second building that has the bankruptcy
2 courts in it so they have plenty of space available.
3 I mean I can't speak for them, but typically they
4 have.

5 CHAIRMAN BECHHOEFER: For extended
6 hearings as well?

7 MR. MARQUAND: For long hearings.

8 CHAIRMAN BECHHOEFER: Okay, that's what we
9 would need.

10 MR. MARQUAND: I mean, we certainly
11 wouldn't have a problem one week being in one
12 courtroom and moving to a second courtroom the second
13 week.

14 JUDGE YOUNG: Okay.

15 MR. DAMBLY: Before we close, Your Honor,
16 this is Mr. Dambly again for the staff because there
17 is an issue that we did want to bring up and I think
18 may need ultimately to be briefed. I don't know that
19 it needs to be briefed, but it should be fairly clear,
20 but I think it has a lot to do with the case that TVA
21 is at least planning on briefing and stuff that's
22 stipulated.

23 I want to make sure everybody knows the
24 order which imposed a penalty and gave notice of
25 opportunity for hearing specifically set forth what

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1 was sent to the Board for a hearing and that is
2 whether the licensee was in violation of the
3 Commission's regulations as set forth in the Notice
4 reference in Section 2 and that notice is a notice I
5 referred to earlier which sets forth the violation in
6 two paragraphs.

7 We have gotten all kinds of requests for
8 stipulation admission having to do with cover letters,
9 documents, all kind of other documents that are
10 totally irrelevant. The Board has gotten one issue
11 here which is the violation that's in the Notice of
12 Violation and that's the two paragraphs I discussed
13 earlier, not whether OI concluded something, whether
14 there is something mentioned in the cover letters
15 somewhere. That is the issue and the only issue that
16 was put before the Board in the order.

17 I think it's important that I make that
18 point now. If somebody is going to have a problem
19 with that, then maybe we need to brief it, but again
20 a lot of this stuff we've gotten from TVA -- it was in
21 a stipulation about something OI did somehow which has
22 no relevance to the issue that was sent to the Board
23 for hearing.

24 JUDGE YOUNG: Just let me ask you, Mr.
25 Marquand, do you disagree with that, that the issue is

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1 as defined -- that the alleged violation is as defined
2 in those two paragraphs and I guess then the next
3 question would be to the degree anything said in the
4 cover letter or anywhere else is relevant it would not
5 be relevant in terms of defining what the issue of the
6 decision is?

7 MR. MARQUAND: I think those cover letters
8 also help define what the issue is and the theory of
9 staff's case. It's felt the violation itself as a
10 result, the very leading -- as a result of an NRC
11 Office of Investigations OI reports a violation of NRC
12 requirements was identified. And it's very clear in
13 that --

14 JUDGE YOUNG: Mr. Marquand, hold on one
15 second. Judge Cole is leaving. I think we can
16 continue to talk about this. He has an appointment he
17 has to go to.

18 Is there anything that you're going to
19 need us to make a ruling on today such that we need to
20 address it to him before he --

21 MR. MARQUAND: No.

22 JUDGE YOUNG: Okay. Then -- no, that's
23 fine.

24 MR. MARQUAND: Mr. Dambly may be quick.
25 We have to brief it to the Board and that's probably

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1 the best way to do it rather than try -- Mr. Dambly
2 and I can talk about it and to the extent that he's
3 got an issue there, we'll brief it.

4 JUDGE YOUNG: I think probably since we've
5 already set this deadline for February 1st for motions
6 for summary disposition, unless there's any real
7 objection, why don't we just clear that as a deadline
8 for any and all motions of any sort and Mr. Dambly,
9 put what you just said in the form of a motion and
10 we'll get a response to it and you know, just to
11 provide any guidance that might be helpful, what I
12 would say is that the notice, the formal notice of
13 violation sets out the particular violation in the two
14 indented paragraphs that that would define what the
15 quote charges are and that other parts of the cover
16 letter or whatever might come in under some other --

17 CHAIRMAN BECHHOEFER: Interpretative of
18 these two paragraphs perhaps.

19 JUDGE YOUNG: Well, to the degree of
20 ambiguity or as to -- in terms of some other factual
21 theory, but that obviously in any situation in which
22 charges or allegations of a violation are filed and
23 since that is set out, I guess I'm having a little bit
24 of confusion in understanding. Mr. Marquand, you are
25 disagreeing that those are the formal charges?

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1 MR. MARQUAND: I don't disagree those are
2 the formal charges. As Judge Beckhoefer said, I think
3 that the letters are instructive as to what the
4 staff's theory was about these violations.

5 JUDGE YOUNG: I guess one thing that I
6 would ask at that point then is if the formal charges
7 are set forth in the two indented paragraphs, I'm not
8 sure that I would necessarily see the relevance of
9 what the staff's theory was before that, sort of
10 comparable to in a licensing proceeding that the
11 actions of the staff are not at issue. What's at
12 issue is the basis for the licensing or the license
13 amendment.

14 MR. DAMBLY: Again, Your Honor, this is
15 Mr. Dambly. That was my exact point and as we're
16 going through discovery, it seems to me that Mr.
17 Marquand wants to argue that if we have one of their
18 witnesses come forth and say yes, he told me was
19 discriminating, I can't use that now because I didn't
20 know that beforehand which is kind of -- means why do
21 we have discovery? The staff is bound by those two
22 charges, not any theory that somebody wrote, the
23 theories can change. God knows TVA's has changed
24 about a dozen times in the course of this proceeding.

25 JUDGE YOUNG: To the degree, I guess, to

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1 the degree that a staff person were to say something
2 that was inconsistent with something in that letter,
3 it seems like that could probably be used for
4 impeachment, but other than that, I guess at this
5 point I'm not seeing the relevance.

6 MR. MARQUAND: Well, we haven't really
7 attempted to argue that to the Board or ask for any
8 relief on that at this point. As I said, we'd be glad
9 to address it later. It doesn't seem to me to be
10 appropriate at this point, and you all want to go into
11 it, we can.

12 JUDGE YOUNG: Well, I guess as I said
13 before, we set the deadline of February 1st for
14 motions for summary disposition. I think we could go
15 ahead and just make that a deadline for any motions
16 and put the responsibility on both of you to discuss
17 that between now and February 1st and to the degree
18 either of you feel there's any disagreement such that
19 there needs to be a motion to file it at that point
20 and get a response to it on the 20th.

21 MR. DAMBLY: Your Honor, this is Mr.
22 Dambly again. I had no intention of filing a motion.
23 I'm just bringing up so we're all clear where the
24 staff is coming from. The order defines what the
25 issues are that were sent to the Board and the issue

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1 is the two paragraphs there. We would put that in our
2 pre-trial brief on the legal issues, just for a
3 clarity point, but it's no motion that I would file.
4 I am not sure what I would move forth.

5 JUDGE YOUNG: One thing that comes to my
6 mind is that there might be a motion in limine. For
7 the Court Reporter, that's L-I-M-I-N-E, motion in
8 limine, to limit any evidence and if that's what
9 you're wanting to do by this, then that might be a
10 motion that you would want to file. On the other
11 hand, if TVA wants to file a motion with regard to
12 whatever arguments you want to make to foreclose
13 anything or to allow, get a definitive ruling from the
14 Board on allowing particular evidence or argument,
15 file it at that point. Otherwise, it's just simply
16 appropriate for the pre-trial briefs to include it in
17 the --

18 MR. MARQUAND: I understand, Your Honor

19 JUDGE YOUNG: Okay.

20 MR. DAMBLY: One other issue since you
21 mentioned motions in limine and am not in the position
22 at this point to know whether I need to file one
23 because it will depend to a large extent on what TVA
24 decides they want to do with one of the witnesses. So
25 I don't know that I can make a decision by February

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1 1st about motions in limine until after I see what
2 their witness list is and what documents they would
3 intend to put into the record pertaining to a witness
4 who has another DOL case pending.

5 JUDGE YOUNG: We could extend the witness
6 and exhibit list deadlines up to March 1st and then --
7 so that we could set a -- or can you -- how soon can
8 you do that so that if there are any evidentiary
9 issues that we could rule on in advance of the --

10 MR. DAMBLY: I would think it would be a
11 fairly short motion that the Board could certainly
12 rule on in advance. I mean once we file everything on
13 the 29th, I mean I would assume once I see their list
14 of documents and witnesses and things they want to put
15 in that we could within a couple of days file a motion
16 in limine if they intend to go where they had
17 indicated at one time they were going to go.

18 JUDGE YOUNG: What I'm thinking though,
19 Mr. Dambly, is I don't want to leave a motion like
20 that for April when we're planning to start the
21 hearing in April and we may have other obligations
22 that have meanwhile come up for earlier in April. I
23 don't want to leave making a ruling on that which
24 might determine which witnesses are called, the length
25 of the hearing, any number of things. I don't want to

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1 put that off until that late, so I guess if there's
2 any chance of any motions in limine and they depend on
3 witness lists, we need to move up those witness and
4 exhibit lists deadlines to March 1st, along with the
5 others.

6 MR. MARQUAND: Your Honor, I don't have a
7 problem moving those dates to March 15th and I would
8 think that -- and frankly, I will be out of the
9 country the last week in March, but I would think if
10 we filed motions in limine by the 5th of April that
11 would give the Board more than two weeks to address
12 any motions in limine and I wouldn't assume motions in
13 limine would be very lengthy in any event.

14 JUDGE YOUNG: Well, as I said, I don't
15 want to leave them until that point. Also, we need to
16 get responses to them, so I would -- that's
17 problematic in terms of legal --

18 [Telephone interruption.]

19 JUDGE YOUNG: Let's set another status
20 conference for about a month from now and we will get
21 back in touch with you on the dates and at that point
22 we want you to have talked to each other about who
23 your witnesses will be and what your proof will be
24 such that we can discuss this in a more enlightened
25 way in early February.

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1 We will also have gotten any motions for
2 summary disposition if you choose to file any by then,
3 so we will be back in contact with you about doing a
4 telephone conference during the week of February 4.

5 Okay?

6 MR. DAMBLY: No objection from the staff,
7 Your Honor.

8 JUDGE YOUNG: Okay, well, then we'll be in
9 touch.

10 MR. MARQUAND: Thank you, Judge.

11 MR. DAMBLY: Thank you.

12 JUDGE YOUNG: Anything else?

13 CHAIRMAN BECHHOEFER: Do any of the
14 parties have any rough idea of how many witnesses they
15 would be using?

16 MR. MARQUAND: Mr. Dambly, I'm assuming
17 that we would be calling as witnesses basically the
18 people who have been deposed. Is that right?

19 MR. DAMBLY: It could be some more. I
20 mean I would assume from the staff, we could have 15
21 to 20. I'm not sure.

22 CHAIRMAN BECHHOEFER: Okay, I see.

23 JUDGE YOUNG: TVA?

24 MR. MARQUAND: I don't know. He has the
25 burden of proof.

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1 CHAIRMAN BECHHOEFER: Yes, he does.

2 JUDGE YOUNG: Do you have any idea?

3 MR. MARQUAND: We wouldn't call -- I can't
4 imagine we'd be calling many people that he wouldn't
5 call.

6 JUDGE YOUNG: Okay, we may be a lot
7 further than we think.

8 CHAIRMAN BECHHOEFER: I'm just trying to
9 get some gauge of where the dates for the hearing are
10 stemming from so --

11 JUDGE YOUNG: Okay. I think we're going
12 to be cut off in a couple of minutes unless we extend
13 it, so do we need to do anything else?

14 CHAIRMAN BECHHOEFER: I don't think so.

15 JUDGE YOUNG: It's been nice talking with
16 you all today.

17 MR. DAMBLY: Thank you, Judge.

18 MR. MARQUAND: Thank you, Judge.

19 JUDGE YOUNG: We look forward to talking
20 with you during the first week in February. Any times
21 during that week when either of you are absolutely
22 unavailable?

23 MR. DAMBLY: Not that I'm aware of, Your
24 Honor, for the staff?

25 MR. MARQUAND: I will make myself

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1 available the entire week, whatever.

2 JUDGE YOUNG: Thank you very much.

3 CHAIRMAN BECHHOEFER: That sounds good.

4 JUDGE YOUNG: Bye-bye.

5 (Whereupon, at 11:50 a.m., the pre-
6 hearing conference was concluded.)

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CERTIFICATE

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

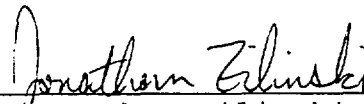
Name of Proceeding: Tennessee Valley Authority

Pre-Hearing Conference

Docket Number: 50-390-CivP, et al.

Location: Telephone Conference

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,
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Jonathan Zilinski
Official Reporter
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